Supreme Court of the United States

OCTOBER TERM, 1943

No. 343

THE ORDER OF RAILROAD TELEGRAPHERS,
PETITIONER,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1943.

CERTIORARI GRANTED OCTOBER 11, 1943.

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TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 2223 CIVIL ACTION.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant,

versus

THE ORDER OF RAILROAD TELEGRAPHERS,
Appellee.

Appeal from the District Court of the United States for the Northern District of Georgia, Atlanta Division.

Alston, Foster, Sibley and Miller, No. 1220 Citizens & Southern National Bank Bldg., Atlanta, Ga.,

A. M. Hartung, Esquire, 230 Park Avenue, New York, City,
Attorneys for Appellant.

Wm. G. McRae, Esquire, 704 First National Bank Bldg., Atlanta, Ga.,

Leo J. Hassenauer, Esquire, 105 N. Adams St., Chicago, Ill.,
Attorneys for Appellee.

COMPLAINT.

District Court of the United States for the Northern District of Georgia, Atlanta Division.

The Order of Railroad Telegraphers, Plaintiff,
vs. Civil Action No. 2223.
Railway Express Agency, Incorporated, Defendant.

1.

The Defendant, Railway Express Agency, Incorporated, is an express company and a "carrier" as defined by Section 1 of the Railway Labor Act as amended, approved June 21, 1934, (48 Stat. L. 1192).

2.

Said defendant carrier operates through the Northern District of Georgia and this petition is brought against the defendant to enforce an Order, issued by the Third Division of the National Railroad Adjustment Board, under date of December 15, 1937, directed to the defendant, ordering said defendant to make effective an Award in favor of petitioner for the benefit of certain joint railway-express agents on the Seaboard Airline Railway, as authorized by Paragraph (p) of Section 3 of The Railway Labor Act above referred to.

3.

The said Award is known as Award No. 548, Docket No. TE-247, of the Third Division of the National Railroad Adjustment Board, and a copy of said Award and Order is hereto attached, marked Exhibit "A", and reference thereto is prayed as often as may be deemed necessary.

4.

The Order directed the defendant to make effective Award No. 548 on or before March 16, 1938, but the defendant has refused to comply with said Order.

5.

The Third Division of the National Railroad Adjustment Board sustained the claim of petitioner that The Order of Railroad Telegraphers has long been and is now the acknowledged and authorized representative of joint railway-express agents in their dealings with carriers, and that on August 1, 1917, petitioner, as such authorized representative of the joint railway-express agents on the Seaboard Airline Railway, executed an agreement with the Southern Express Company specifying rates of commission and transfer allowances to be paid said joint railway-express agents for handling express shipments on the Seaboard Airline Railway; that Article 14 of said agreement specifically provided that no change would be made in the agreement until after thirty days' written notice; that said agreement is binding upon the defendant, Railway Express Agency Incorporated; as a successor of the Southern Express Company; that the defendant violated said agreement on April 1, 1930, and subsequent thereto, by changing said commission rates and transfer allowances in violation of the terms of said agreement; and that the contract remains in force and effect. A copy of said contract is hereto attached, marked Exhibit "B", and by reference made a part of this paragraph of the petition.

6.

By said Order the Third Division of the National Railroad Adjustment Board directed the Railway Express Agency, Incorporated, as follows:

"1. The Commission rate on carload express shipments accruing to the joint railway-express agent at Lawtey, Fla., as established by Article 2 of the Express Agreement of Aug. 1, 1917, and at all other joint agencies on the Seaboard Air Line handling carload express shipments, shall be restored as of the date of the rate are arbitrarily reduced.

"2. That the minimum amount of commission of ten dollars ($10.00) per month, as established and guaranteed by Article 2 of the Express Agreement of Aug. 1, 1917, shall be restored to the joint railway-express agency at Rutherford, Ala., and at all other joint railway-express agencies where the minimum rate has been arbitrarily reduced or reduced through individual agreement between the express company and agent; and that these agents be retroactively reimbursed in the amount of the difference that should have been paid under the Express Agreement.

"3. That all transfer allowances established by Article 3 of the Express Agreement of Aug. 1, 1917, and higher rates in effect which have been arbitrarily changed, or changed by individual agreement, as at Moncure, N. C., shall be restored retroactively to the date such changes were made in violation of the Express Agreement, and all agents affected be paid the difference due them under said Express Agreement."

7.

That the defendant Railway Express Agency, Incorporated, under the terms of said Order, should be required to pay to petitioner as the representative of the persons for whose benefit such order was made the sum of $46,-314.86.

8.

Petitioner attaches hereto sworn statements of the several employees for whose benefit said Order was made showing the amounts due individual agents at stations on the Seaboard Airline Railroad under the terms of said Order, as follows:

Employee.—Station.	Amount Due.
L. F. Johnson, Fairfax, South Carolina	$ 30.00
M. J. Stokes, Wattsville, Alabama	357.34
J. L. Williams, Lake Jem, Florida	317.11
T. F. Womble, Apex, North Carolina	150.00
C. B. Holmes, Councils, North Carolina	520.85
R. H. Turner, Emory, Georgia	168.80
T. P. Barber, Fairfax, South Carolina	373.70
W. J. Benton, Fairfax, South Carolina	23.84
J. T. Williams, Taylorsville, Ga.	87.20
T. C. Crayton, Taylorsville, Ga.	42.98
J. H. Payne, Odenville, Alabama	481.25
C. Dinkins, Lawtey, Florida	38,744.41
Paul Smith, Emory, Georgia	607.97
D. G. Stutz, Southern Pines, N. C.	535.86
J. A. Walker, Taylorsville, Ga.	139.35
O. H. Smith, Pembroke, Georgia	161.30
A. T. Walker, Rutherford, Alabama	438.21
H. D. McPherson, Meggetts, South Carolina	61.64
H. A. Borst, Vass, North Carolina	1,467.58
C. F. Carlton, Boykins, Virginia	1,230.00
C. B. Copeland, Meggets, South Carolina....	105.47
E. Meares, McBee, South Carolina	270.00

These statements are marked Exhibits "C" to "X" respectively, and by reference made a part of this petition.

9.

The defendant has failed to comply with said Order by restoring the rates of commission and transfer allowances for express shipments as directed in said Order and should be required to do so.

10.

Petitioner avers that it is entitled to be allowed a reasonable attorney's fee, to be taxed, and collected as a part of the costs of said suit, in the event it shall finally prevail in this suit.

Wherefore, petitioner prays that this Court make such order, and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce the Order of the Third Division of the National Railroad Adjustment Board to make effective its Award No. 548, as herein set forth, and to allow a reasonable attorney's fee.

WM. G. McRAE,
Attorney for Petitioner.

Award No. 548
Docket No. TE-247

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur M. Millard, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

RAILWAY EXPRESS AGENCY, INCORPORATED

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on Seaboard Air Line Railway that:

"1. The commission rate on carload express shipments accruing to the joint railway-express agent at Lawtey, Fla., as established by Article 2 of the Express Agreement of Aug. 1, 1917, and at all other joint agencies on Seaboard Air Line handling carload express shipments, shall be restored as of the date the rate was arbitrarily reduced.

"2. That the minimum amount of commission of ten dollars ($10.00) per month, as established and guaranteed by Article 2 of the Express Agreement of Aug. 1, 1917, shall be restored to the joint railway-express agency at Rutherford, Ala., and at all other joint railway-express agencies where the minimum rate has been arbitrarily reduced or reduced through individual agreement between the express company and agent; and that these agents be retroactively reimbursed in the amount of the difference that should have been paid under the express agreement.

"3. That all transfer allowances established by Article 3 of the Express Agreement of Aug. 1, 1917, and higher rates in effect which have been arbitrarily changed, or changed by individual agreement, as at Moncure, N. C., shall be restored retroactively to the date such changes were made in violation of the Express Agreement, and all agents affected be paid the difference due them under the Express Agreement."

STATEMENT OF FACTS: In their ex parte statement the employes submitted the facts as follows:

"An express agreement, revised as of Aug. 1, 1917, was duly executed between the Southern Express Co. and the General Committee of The Order of Railroad Telegraphers in behalf of the joint railway-express agents on Seaboard Air Line Railway. The agreement governed the rules and rates of commission and transfer allowances for the joint agents on the Seaboard Air Line Railway, and was in effect when the Southern Express Co. was succeeded by the American Railway Express Co. and later by the Railway Express Agency, Inc., which companies assumed all contracts of their predecessors.

"Beginning in the year 1930, the Railway Express Agency, Inc., arbitrarily, or through individual agreement with the joint agent, reduced the commission and transfer allowance at numerous agencies in violation of Articles 2, 3 and 14 of the Express Agreement, and arbitrarily established a flat commission rate on carload shipments by express of $5.00 per car in violation of these articles.

"The Railway Express Agency, Inc., the agent for the railway in the express transportation business on its lines, declines to confer with the Committee on these matters and declines to make adjustment of the violations of the express agreement.

"The Express Company has declined to join with the Committee in submitting this dispute to the Adjustment Board."

The Carrier, the Railway Express Agency, Inc., stated the facts as follows:

"This company has not nor has it ever had any contract with this Organization bearing date of Aug. 1, 1917, or any other date. Also, that this Agency has been informed that the Express Agreement referred to by the representatives of the Order of Railroad Telegraphers was one between the Southern Express Company and the Order of Railroad Telegraphers, but the Southern Express Company retired from the domestic Express business midnight June 30, 1918. On July 1, 1918, and thereafter, the Express business on the Seaboard Air Line and all other railroads of the United States was handled by the American Railway Express Co. as Agent for the Director General of Railroads. The American Railway Express Co. entered into no agreement with the Order of Railroad Telegraphers and did not formally or otherwise take over the above mentioned contract executed by the Southern Express Co., and on several occasions so stated to representatives of the Order of Railroad Telegraphers. In fact, in its operating agreement with the Director General of Railroads, no provision was made for the assumption of any contracts affecting Express commissions, but on the contrary, such operating contract provided that Express commissions be paid direct to the U. S. Railroad Administration.

"The American Railway Express Co. retired from the domestic Express transportation business Mar. 1, 1929, and was succeeded by the Railway Express Agency, Inc. The Railway Express Agency did not receive from the American Railway Express Co. any contracts involving the payment of Express commissions on the Seaboard Air Line or any other railway, nor did it take over any contract between the American Railway Express Co. and the Order of Railroad Telegraphers involving Express commissions or any other thing whatever."

POSITION OF EMPLOYES: "Effective July 1, 1909, a signed agreement was executed between the Southern Express Co. and the General Committee of the Order of Railroad Telegraphers on Seaboard Air Line Railway, governing rules, rates of commission and transfer allowance for agents in the employ of the Seaboard Air Line Railway who are required by the railway to also serve the express company as agent, or perform transfer service, at railroad stations. This agreement was revised as of June 1, 1912, and again on Aug. 1, 1917, and was in full force and effect when the United States Railroad Administration assumed control and operation of transportation by railroad.

"On June 26, 1918, the United States Government, through the Director General of Railroads, negotiated a Memorandum of Agreement with the four principal express companies operating at that time (the Adams, American, Wells-Fargo, and Southern) through the medium of a newly organized joint operating company, titled the 'American Railway Express Company,' which company, under the terms of the Memorandum of Agreement, was the sole agent of the Government under the supervision of the Director General of Railroads to conduct the express transportation business upon all lines of railroad under Federal control and upon such other systems of transportation or parts thereof as in the judgment of the Director General it became necessary or desirable to include. This possession and control of the express business by the Director General was later confirmed by proclamation of the President of the United States as of Nov. 18, 1918.

"The American Railway Express Company—the joint operating company for the Adams, American, Wells-Fargo, and Southern Express Companies—was maintained after the termination of Federal control, and on Sept. 1, 1920, at the end of the Guarantee Clause (Sec. 209) of the Transportation Act, 1920, a 'Uniform Contract for Express Operations over Rail Lines' was prepared and executed between the American Railway Express Company and Rail Companies in the United States, including the Seaboard Air Line Railway, whereby the Express Company was granted the exclusive right and privilege to control, conduct and transact all of the express transportation business over its lines.

"Thus, the joint operating company—the American Railway Express Company—operated the express transportation business on the Seaboard Air Line

Railway for the Southern Express Company, and took over and assumed the obligations and contracts of the Southern Express Company, and continued to do so until succeeded by the Railway Express Agency, Inc., at which time it was operating under a contract with the Rail Companies amended as of March 1, 1923.

"As of March 1, 1929, the Rail Companies in the United States united in acquiring the American Railway Express Company through their own express agency, thereaftef known as the Railway Express Agency, Inc., and have since conducted the operations of the express business through such express agency, and on the Seaboard Air Line Railway in particular. In taking over the American Railway Express Company, the Railway Express Agency, Inc., assumed (see Poor's Manual of Railroads, p. 1729, 1929) all leases and contracts pertaining to the express transportation business and agreed to liquidate and settle accounts of the American Railway Express Company arising out of the conduct of the express business prior to March 1, 1929.

"The joint railway-express agents on the Seaboard Air Line Railway, thru their General Committee of the Order of Railroad Telegraphers, held schedule contract with the Southern Express Company governing rules, commission rates and transfer allowances for the handling by them of the express transportation business at their railroad stations, last revised as of Aug. 1, 1917. This contract is signed by J. B. Hockaday, Vice-President for the Eastern Department, and by W. S. McFarland, Vice-President and General Manager for the Western Department; for the Southern Express Co., and D. May, General Chairman of The Order of Railroad Telegraphers for the joint agents, at Atlanta, Ga., on Aug. 18, 1917, and effective as of Aug. 1, 1917.

"Article 14 of the schedule contract reads:

> 'No change will be made in the foregoing articles until after notice of thirty (30) days, in writing, has been given.'

"No notice of change in any of the articles of the contract has ever been submitted in writing or otherwise to the General Committee of the joint agents, since executed.

"The American Railway Express Company, organized during Federal Control as a joint operating company for the Southern Express Company, assumed all contracts of the Southern Express Company, and the contract of the Southern Express Company with the General Committee of The Order of Railroad Telegraphers in behalf of the joint agents in the employ of the Seaboard Air Line Railway can be made no exception. This contract was observed and complied with by the American Railway Express Company with respect to the handling of express business at the stations of the joint agents, their commission rates, transfer allowances, and handling of grievances of the joint agents arising out of same.

"Early in the year 1921 conditions made it desirable that the contract be revised by the Committee and conferences to that end were sought and held with Mr. W. P. Smith, Vice-President, American Railway Express Co., at Atlanta, Ga., on Aug. 19, 1921, and on Sept. 27, 1921. Conditions between the railroads and the express company, as well as with the joint agents, were very unsettled at this time, and as a result of these conferences it was decided by the Committee to await a more favorable opportunity.

"The effort to revise the contract was renewed with Vice-President Smith of the American Railway Express Company on Sept. 7, 1923, who advised that such matters were then handled by the Committee on Wages and Working Conditions of the Express Company at New York City, Mr. L. R. Gwyn, Chairman, to whom the Committee's request was referred. Chairman Gwyn of the Express Company advised us under date of Sept. 17, 1923, by letter, that he could not properly deal with our organization, as, in his opinion, the men involved were employes of the railroad and that the Labor Board, in Decision No. 757, had taken the same view, and that service performed by such railroad employes for the express company was incidental and would not constitute the

express company as being their employer, nor them to be its employes, within the meaning of the Transportation Act, 1920; and further, as collective bargaining assumed a relation as employer and employe, it did not appear the express company was in a position to deal with us on that basis. Mr. Gwyn declined any knowledge that his company had ever made any agreement with our organization.

"In view of the existence of the agreement entered into by the Southern Express Company with our organization on the Seaboard Air Line Railway as late as Aug. 1, 1917, which contract was taken over by the American Railway Express Company as the operating company, the position taken by Mr. Gwyn was not acceptable, and the dispute was referred to the United States Railroad Labor Board by us, in ex parte, in October, 1923, citing the American Railway Express Company.

"The Labor Board held hearing in the dispute on Feb. 15, 1926, and as stated by the Board in its decision, there appeared to be a division of opinion (between the Express Company and the Carrier) as to who should accept the responsibility—the duty and obligation of determining with whom the employes shall meet and negotiate—and that they should, for the best interest of all concerned, settle this question; and the Board promulgated the following decision in Decision No. 4087, Docket 3049, on Mar. 19, 1926:

> 'Decision: The Railroad Labor Board directs that in the case of each dispute duly authorized representatives of the carrier, or carriers, involved, and of the express company shall promptly confer and decide with whom the employes shall negotiate to a conclusion the question in dispute. Following such designation, negotiations shall be promptly conducted.'

"Neither the Seaboard Air Line Railway nor the American Railway Express Company ever notified our Committee whether, in compliance with the above Decision No. 4087, the railroad or the express company was designated as the party with whom we should negotiate in matters arising out of joint agents handling express business at their stations. We attempted to negotiate such matters with the management of the railroad in April, 1932, but made no progress whatever, and upon invoking the services of the United States Board of Mediation, the carrier declined to arbitrate.

"Effective as of Apr. 1, 1930, the Railway Express Agency arbitrarily placed in effect a flat rate of commission on carload shipments to the joint agents of $5.00 per car, without notice or conference with our Committee.

"The Express Company has also made individual agreements with certain of the joint agents to handle the express business on a straight commission basis without regard to the guaranteed minimum of ten dollars ($10.00) per month established by Article 2 of the Express Agreement.

"The Express Company has further arbitrarily reduced the amount of the transfer allowance and made individual agreements with certain of the joint agents to reduce the allowance below that specified in Article 3 of the Express Agreement, without notice to or conference with the Committee.

"In attempting to treat with the Railway Express Agency on these matters of violation of the express agreement, the Express Company assumes the attitude that our organization has no agreement with the Express Company and declines to recognize our Committee as the representative designated by the joint agents to handle such matters, and has declined to join with us in submitting the dispute to the National Railroad Adjustment Board.

"It is the contention of the representative committee of these joint agents that the Express Agreement entered into with this Committee by the Southern Express Company, effective as of Aug. 1, 1917, is a contract duly executed between the parties, and that such contract was observed and complied with by the succeeding Express Company—the American Railway Express Company—and has not been abrogated in any manner since executed.

"The Committee further contends that the Railway Express Agency, Inc., upon taking over the express transportation business of the Southern Express Company on the Seaboard Air Line Railway, as succeeded by the American Railway Express Company, assumed this contract with all other contracts of the American Railway Express Company, and is, therefore, obligated under the contract to the same extent and in the same manner as the Southern Express Company, with whom it was executed, and as the American Railway Express Company, its successor."

POSITION OF CARRIER, THE RAILWAY EXPRESS AGENCY, INC.: "We shall not burden the Board with a repetition of the grounds on which we contend that this Board is without jurisdiction, or renew our argument as to that aspect of the proceeding, except to state that in reaching its conclusion as to jurisdiction, the Board has taken the position that there is in effect an agreement between the Order of Railroad Telegraphers and Railway Express Agency, Inc., on the improper assumption that an agreement between the Southern Express Company and its Joint Agents was assumed by the American Railway Express Company, and, in turn, by the Railway Express Agency, Inc., because the same rates of commission which previously had been paid to railroad employes, serving also as express agents, were continued in effect for a number of years, and because the courts had, in some instances, decided that the American Railway Express Company was responsible for certain claims for loss and damage to shipments, and personal injuries, of the Adams Express Company, Southern Express Company and Wells Fargo & Company, which had accrued during the period those companies conducted the express business. In so deciding, the Board disregarded the positive sworn testimony which had been presented to it, to the effect that the agreement between the Southern Express Company and its joint agents never had been assigned by the Southern Express Company to the American Railway Express Company, never had been accepted by the American Railway Express Company, and never had been assumed by that Company, and that the complainant organization, and its officers, repeatedly has been so advised. Of course, there never has been any contention on the part of the complainant that Railway Express Agency, Inc., has entered into any agreement with it, and it rests its claim solely on the ground that the agreement between the Southern Express Company and its joint agents became successively binding on the American Railway Express Company and the Railway Express Agency. As has just been stated, the proof is indisputable, that the agreement never was assumed by the American Railway Express Company, and, obviously, under those circumstances, it could not have been assumed by Railway Express Agency, Inc., and, in fact, it was not so assumed by Railway Express Agency, Inc.

"In view of the action of the Board in taking jurisdiction, we have thought it desirable somewhat to amplify the evidence with respect to the point that the agreement of the Southern Express Company with the joint agents was not assumed by the American Railway Express Company, and later by Railway Express Agency, Inc., and call attention to the affidavit of Mr. L. R. Gwyn, Vice-President in Charge of Personnel, of Railway Express Agency, Inc., attached hereto and made a part hereof, in which he states definitely and positively that neither the American Railway Express Company nor Railway Express Agency ever have had any Agreement with The Order of Railroad Telegraphers, and that the agreement of the Southern Express Company with its joint agents, never was assigned to, accepted by, or assumed by the American Railway Express Company or the Railway Express Agency, and that The Order of Railroad Telegraphers, and its responsible officers, repeatedly have been so advised, and, in support of his statements, attaches to his affidavit his letter of Oct. 6, 1925, to Mr. B. C. Lewis, General Chairman of The Order of Railroad Telegraphers, and quotes testimony introduced by him in a proceeding before the United States Railroad Labor Board on Feb. 26, 1926, in Docket 4624. This evidence is too clear, convincing and positive, to require further comment or discussion, and it seems to us that, upon further consideration, this Board necessarily must conclude that there is not, now and there never has been in effect an agreement between The Order of Railroad Telegraphers and Railway Express Agency, and that the claim herein presented, which rests upon the theory that such agreement exists, must fail, and the case be dismissed.

"Coming now to the discussion of the alleged reduction in the commission rate on 'carload' express shipments, accruing to the joint railroad-express agent at Lawtey, Florida, we call attention to the attached affidavit of W. W. Owens, Vice-President, Southern Departments, Railway Express Agency, Inc., and, immediately prior to Apr. 1, 1929, holding a similar position with the American Railway Express Company, for which Company he had previously served as General Manager at Jacksonville, Florida, and Washington, D. C., since July 1, 1918, before which time he had been Vice-President of the Southern Express Company, having jurisdiction over Accounting, Traffic, Treasury and Supply Departments. Mr. Owens states that the Seaboard Air Line Railway Company had in its successive contracts with the Southern Express Company, American Railway Express Company and Railway Express Agency, Inc., specifically reserved to itself the right to handle the transportation of carload shipments of perishables in refrigerator cars, and that the express companies did not conduct, or have the right to conduct, that business over the lines of the Seaboard Air Line Railway. For many years the shippers of strawberries from Florida, and the Florida Railroad Commission, had endeavored to secure express service for carload shipments of strawberries in refrigerator cars from Florida to northern and eastern markets, and, finally, in June, 1929, the Interstate Commerce Commission directed the Seaboard Air Line Railway Company, and other railroad companies, to furnish refrigerator cars for the movement of strawberries from Florida to northern and eastern markets on schedules which would provide service equivalent to passenger train transportation.

"The time intervening between the date of the service of the order and the beginning of the strawberry movement from Florida, was insufficient to enable the railroad companies themselves to undertake the service, and shortly prior to the commencement of the season, the Seaboard Air Line Railway Company requested the Railway Express Agency to take over the handling of the traffic during the 1929-1930 season, with the specific provision that the arrangement was to expire on June 30, 1930; the same arrangement was made for the 1930-1931 season, and the 1931-1932 season, and for subsequent seasons.

"When this special agreement was entered into, consideration was given to the arrangement which would be made for the handling of the traffic from points like Lawtey, Florida, where the express business was being handled by a joint railroad-express agent.

"Starke and Lawtey, both located on the Seaboard Air Line Railway, and not far distant from each other, are two principal shipping points of strawberries from the so-called northern strawberry shipping district of Florida. At Starke, the Railway Express Agency has an exclusive agent, who is paid a salary, and, in order that the business at Lawtey might be conducted on substantially the same basis, it was decided that an exclusive office, likewise, should be established there, since the payment of the same rate of commission on carload shipments, as was being paid on less-than-carload shipments, would be wholly disproportionate and grossly excessive. This was especially so because the services performed by the agent are substantially less in connection with the carload shipments than with the l. c. l. shipments. On the l. c. l. traffic the agent not only has to issue the receipt and waybill the shipment, but he is obliged to move that shipment to the express car in the passenger train, load and unload the traffic on station trucks and move the traffic to and from the depot office; whereas, in connection with the carload traffic the loading, bracing and counting of the contents of the car, is performed entirely by the shipper, and all the agent has to do is to issue a receipt, waybill the car and arrange for its train movement from the point of origin.

"The decision of the Express Agency to establish an exclusive agency at Lawtey obviously was the economical, proper and practical thing to do, but when arrangements to that end were undertaken, the joint railroad-express agent at Lawtey specifically requested that he be permitted to handle this new carload business, and agreed to do so at a compensation amounting to $5.00 per car, as it is evidenced by his letter of Nov. 29, 1929, to A. B. Scruggs, Superintendent, at Jacksonville, Fla., a copy of which is presented in full in the attached affidavit of Mr. Owens.

"The basis of compensation so agreed upon is comparable to that paid in other parts of the United States where carload shipments of perishable commodities are handled by express, and the scale of compensation so agreed upon resulted in the payment of express commissions to the agent at Lawtey of $2,076.61 in 1930, in comparison with $1,732.44 in 1929, and $1,185.43 in 1928 (in addition to the compensation received from the railroad company for acting as its agent at Lawtey).

"The impropriety of the payment of the same rate of commission on carload traffic that is applicable to l. c. l. shipments, is shown very fully in the affidavit of Mr. Owens, and further elaboration of this point seems unnecessary here. It suffices to say that the application of the commission rate of 10 per cent paid on l.c.l. shipments would result in the payment of a commission of $49.60 on one carload shipment of strawberries from Lawtey, Florida, to New York City, moving at the minimum billing weight, and that the same rate applied to the season of 1930 results in a claim for further commission of $4,203.43, in addition to the payment of $5.00 for each carload shipment.

"When consideration is given to the fact that this business moves during a period of six weeks to two months, which is the shipping season of strawberries from that section of Florida, to the negligible amount of service performed by the agent in connection with the handling of such shipments, to the fact that he received $660.00 in commissions on such shipments, in addition to his commissions on the l. c. l. express business, and his salary as railroad agent, it seems unnecessary to say more to establish the utter impropriety and inequity of allowing the l. c. l. rate of commission, which would call for the payment of an additional $4,203.43.

"The affidavits of Mr. Gwyn and Mr. Owens show that the American Railway Express Company, for practical reasons, continued the same rates of commission in effect which had previously been paid by the various express companies which conducted the express business prior to July 1, 1918. As Mr. Gwyn states in his affidavit 'The mere fact we continued those rates does not mean anything. We continued the salaries. We continued the rates of commission every place just as they were. We took the business of these other companies as a going concern and kept it going, but we did not increase or decrease the commissions in the southeast or any other part of the country. We continued those commissions and in a very large way we continue to pay those rates today, but it is no more true of the southeastern section of the country than it is of New England, if you like. As a matter of fact, under the Director General we would not have had authority either to increase or decrease those rates, except with the consent of Mr. McAdoo, but we never did assent to the assumption of that contract, and when we were asked to revise it so notified the organization.'

"The continuation of the commissions at the same rate was not because of the agreement between the Southern Express Company and its joint agents, it was the only action which could be taken from a practical standpoint; the commissions varied in different sections of the country, the only feasible workable thing to do was to continue those commissions in effect unless and until investigation developed that some other action should be taken as to all of them or some of them. That is exactly what has happened. Thereafter, from time to time, revisions have been made in the rate of commissions paid to joint railroad-express agents, and in the transfer allowances, and those revisions have been upward as well as downward, dependent upon business conditions.

"In conclusion we repeat that Railway Express Agency never has entered into an agreement with The Order of Railroad Telegraphers, and that it has not assumed the agreement between the Southern Express Company and its joint agents, and the complainant herein repeatedly has been so advised by Railway Express Agency, and long prior thereto by American Railway Express Company."

OPINION OF BOARD: The original contentions of the Railway Express Agency, Inc., hereinafter termed the carrier, that this Third Division of the National Railroad Adjustment Board was without jurisdiction insofar as it per-

tained to the consideration and handling of this claim, have been fully determined by Award Number 298 of this Division, rendered on September 17, 1936, and in which the contentions of the carrier were overruled. The Board reaffirms the decisions and rulings with respect to the jurisdiction of this Third Division and Award Number 298 is made a part of this record, and the issue now before the Board is soley with respect to the merits of the claim.

The dispute at issue represents a claim of the General Committee of The Order of Railroad Telegraphers for the restoration of the former commission rates and transfer allowances, paid to joint railway-express agents or agencies on the Seaboard Air Line Railway by the Railway Express Agency, Inc., and which were reduced by the Express Agency effective April 1, 1930. A further issue of the claim is for the retroactive reimbursement to such agents or agencies for the difference in the amounts paid or the monetary loss sustained by reason of the reduction in express commissions and transfer allowances.

In support of their contentions in this dispute the General Committee submits that an agreement was entered into by the Southern Express Company on August 1, 1917, with a Committee of the Order of Railroad Telegraphers, in behalf of the joint railway express agents, and pertaining to rates of pay, rules and regulations for such agents jointly employed as Railway and Express Agents on the Seaboard Air Line and that such obligations passed on to the successor companies of the Southern Express Company.

The General Committee further contends that this agreement continued to be assumed by the successors of the Southern Express Company until April 1, 1930, when the Railway Express Agency, Inc., violated Article 14 of the agreement between the parties by reducing the rates and making individual agreements with certain of the joint agents without conference and agreement with the General Committee.

The carrier contends that the agreement of the Southern Express Company was never assigned to or assumed by its successor companies; and that this "document" or agreement signed by "D. May" for the joint agents was not executed by a committee of the Order of Railroad Telegraphers.

The carrier further contends that in lieu of establishing an exclusive agency at Lawtey, Florida, it was justified in making an independent agreement with the joint railway express agent at that point, as well as in making independent individual agreements at other points, and bases its contentions on the statement that the Railway Express Agency, Inc., had never entered into an agreement with the Order of Railroad Telegraphers and that it had or has not assumed the agreement between the Southern Express Company and its joint agents.

From the voluminous mass of correspondence, exhibits, and argument submitted in this case, both as they apply to jurisdiction and merits, the principal dispute now at issue is the agreement between the Southern Express Company and the joint railway-express agents or agencies, and the making of independent agreements with joint agents of the Railway Express companies.

On that subject the Board agrees with the Opinion of the referee in Award Number 298 that "the practice by which railroad agents are paid commissions for services performed for companies other than their principal employer, the particular railroad company, is sufficiently general to be regarded as a part and parcel of the system under which industrial relations on American Railways are conducted."

In these joint agencies that are established the Railroad is the primary and governing employer and the Express Agency is the secondary employer, and there is little or no doubt but that the compensation or wages paid by the carrier to the joint agents affected are predicated upon an estimate, knowledge or reasonable assumption of the express commissions or allowances the joint agents receive from the performance of those duties incident to their railroad work which are performed for the Express Agency; and when reductions are made in express

commissions or allowances without an adjustment being made in the railroad compensation, the entire fabric upon which the wage structure or basic rates are founded is disturbed. It is upon these facts that the Referee in Award 298 correctly bases his statement that a triangle is established, no side of which can be removed or weakened without considering what the result would be to the other two sides. These facts are fundamental in the relationship between employer and employe, and in this, as in other disputes of the same character, the Board submits its unqualified opinion that if or when a change is contemplated or to be made in which the basic structure or rates are to be affected, such change should only be made after conference, negotiations and agreement between the parties at issue.

In the instant case the original agreement was made between the express company and the joint agents, but in permitting the express company to reduce the basic rates, without conference, adjustment and agreement, which was undoubtedly done with the concurrence of the Railway Company, a responsibility rests upon the Railroad Company as clearly as if it had reduced the railroad salary of the agents affected by unilateral action.

In considering the contentions of the carrier that the agreement of August 1, 1917, made for or between the joint agents by the Southern Express Company, was never assigned to or assumed by its successor companies, and that the agreement signed by D. May for the joint agents was not executed by a committee of the Order of Railroad Telegraphers, the Board submits with respect to the latter contention, that the status of the signer of the agreement is not an issue of particular importance, as the fact that the agreement was made and signed, that its terms were put into effect, that the joint agents in whose interests the agreement was made are covered by the telegraphers agreements, and that the Order of Railroad Telegraphers has long been and is now the acknowledged and authorized representative of agents in their dealings with carriers, is ample evidence that the agreement made was an authentic contract existing between the parties.

As for the agreement made with the Southern Express Company, the question of whether the agreement was specifically assigned to its successors is not an especially important one. The fact is that an agreement between the parties was made and ratified and which in addition to specifying rates of commission and transfer allowances to the joint railway-express agents or agencies affected, specifically provided in Article 14 that no change would be made in the agreement until after thirty days' written notice.

From the making of that agreement in 1917 until in 1930 when the carrier reduced the commission rates and transfer allowances without conference and negotiation with the General Committee representing the joint agents, the agreement continued in force and was observed by both the General Committee representing the agents or agencies and the respective successors of the Southern Express Company, and the facts are evidenced that the rates, rules, and requirements of that agreement did not expire with the change of ownership, management, or operation of the carrier, but has continued to exist as a contractual agreement between the two parties until changed in the manner provided in the agreement.

During the period in which the contractual agreement was operative the carrier had ample opportunity for conference and agreement with the General Committee representing the joint agents as to any contemplated change or conditions specified in the agreement. Undoubtedly the Railroad Company, as the primary employer of the agents affected, was fully aware of the existing agreement, as the commission rates and allowances constituted a factor in determining the rate structure or basic rates paid the agents for the services performed for the Railroad Company, and as the changes in the commission allowances could not have been made without the concurrence of the Railroad Company, so would the knowledge of the existing agreement have been a matter of joint understanding and discussion had there been any doubt as to its existence and validity.

However that may be, from the facts introduced the Board concurs in the opinion rendered in Award No. 298, which is a part of this record, that in the light of an instrument which over a long period of years was regarded as an agreement between the joint agents and the Southern Express Company, and which specified definitely how it could be terminated, the instrument was an agreement establishing an employer-employe relationship, and in the observance of the terms of that agreement over a period of years by the successors of the Southern Express Company and the facts herein submitted, there was no doubt as to the knowledge of an existing agreement between the parties, and no basis upon which such agreement could be abruptly terminated, or the carrier relieved from the responsibilities of an existing employer-employe relationship and agreement by ex parte action.

With respect to the making of agreements with individual agents, and without questioning the various legal citations submitted by the carrier, the Board submits that the Railway Labor Act did not and does not compel agreements between parties, the facts are, however, that in the conditions of the instant case an agreement exists and did exist in which the joint agents making individual agreements with the carrier, had previously made an agreement with the representative of the Order of Railroad Telegraphers, and so long as they were parties to that agreement they were bound by it, and so long as that agreement was in force any agreement subsequently made which was at variance with that original agreement was void unless the original agreement had been removed or voided by the same process as when it was made.

In other words, in the claim at issue the facts are evidenced that the joint railway-express agents on the lines of the Seaboard Air Line Railway were working under a collective agreement which had been properly negotiated between and ratified by the carrier, or the Express Company, and its successors, and the organization of which they formed a part. So long as these joint railway-express agents were employed by the carrier in such capacity, they were working under the rules of that agreement and were bound by its specifications and requirements; and any other supplementary individual agreement or contract made or entered into that would in any manner change or modify, invalidate or set aside, or that was at variance with the rates, rules, and requirements of that agreement, was invalid and a violation of the principles of that agreement unless negotiated and ratified between, the principals of the original agreement.

Under the conditions outlined and the facts in evidence, this Division finds that, the contract of agreement of August 1, 1917, was an agreement between the Order of Railroad Telegraphers and the Southern Express Company and which was in turn assumed and observed by its successor companies, and that no notice having been served by either of the parties to change or terminate such contract under the terms of Article 14 thereof, that the contract remains in force and effect.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

That the carrier and employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the action of the carrier, or Railway Express Agency, Inc., in reducing the commission rates and transfer allowances without conference and agreement was a violation of the existing agreement between the parties.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 15th day of December, 1937.

DISSENT

Dissent is registered to this award for these reasons:

First—The respondent party, the Railway Express Agency, Inc., never entered into any agreement with the petitioner relating to the matters involved in this claim.

Second—The respondent, though succeeding the American Railway Express Company which had previously acquired certain business of the Southern Express Company, did not assume, but in fact disclaimed, the agreement between the Joint Agents and the Southern Express Company effective August 1, 1917. The award is in error in declaring that the agreement of August 1, 1917, "was an authentic contract existing between the parties" to the instant dispute.

Third—The award thus disregards the basic requirement for establishment of a legal contract and arbitrarily declares a contract to exist; it then proceeds to further error by ignoring the conditions existing in respect to carload express shipments, a major element and specification in the claim in dispute. Carload express business could not have been subject of the original agreement between the Joint Agents and the Southern Express Company, which this award declares to be in current existence between the present parties to this dispute, and could not be handled by either the Southern Express Company, the American Railway Express Company or the Railway Express Agency, Inc., by reason of their succeeding contracts with the Seaboard Air Line Railway which reserved to the latter the right to handle all transportation of such carload shipments.

Fourth—The imputation that the agreement with the individual agent at Lawtey, Florida, was at variance with the original Joint Agents—Southern Express Company Agreement, which is carried in the declaration in the "Opinion of Board" by the referee that any agreement made with an individual one of the joint agents who were bound by the original agreement between the Joint Agents and the Southern Express Company was void because of variance with that original agreement so long as the latter was in force, is not supported by the evidence in the record. The rate of commission on carload express shipments at Lawtey, Florida, was established by individual agreement between the respondent and the joint agent at that point; that individual agreement was not at variance with the original agreement between the Joint Agents and the Southern Express Company even though the latter may be arbitrarily enforced upon the respondent, the Railway Express Agency, Inc., because the carload express business, by contract between the express companies here involved and the Seaboard Air Line Railway having been reserved to the latter, was not existent for the Southern Express Company to negotiate upon with the Joint Agents.

Fifth—The denial of the right to individual contract between the respondent and an individual agent such as the joint agent at Lawtey, Florida, under the circumstances of this case, which did not controvert any other agreement actually

in effect, is a denial of the constitutional right of the parties as specifically stipulated in recent decision by the Supreme Court of the United States, stating that the provisions of the Railway Labor Act do not prohibit a carrier from "entering into such contract of employment as it chooses with its individual employes." The transgression of constitutional rights of individuals by an award of this character from this quasi-judicial board may not be accepted without fear of destruction of inalienable rights.

C. C. COOK.
J. G. TORIAN.
A. H. JONES.
GEO. H. DUGAN
R. H. ALLISON.

BRONSON CANODE PRINTING CO., CHICAGO
548

7 EXHIBIT "B"—CONTRACT.

Southern Express Company.

Rates of Pay and Regulations for Joint Express and Railroad Agents on the Seaboard Air Line Railway:

Effective August 1st, 1917, the following rules and rates of pay will govern the Southern Express Company's Agents who are jointly employed as railroad and express agents.

Article 1.

This schedule applies solely to express agents as above designated.

Article 2.

Commissions on total business received and forwarded, based on previous year's business, will be paid as follows:

When commissions do not exceed fifty dollars per month, ten per cent.

When commissions exceed fifty dollars per month, but not more than seventy-five dollars per month, nine per cent.

When commisions exceed seventy-five dollars per month, but not more than one hundred dollars per month, eight per cent.

When commissions exceed one hundred dollars per month, seven per cent.

When commissions do not exceed ten dollars per month a guarantee of ten dollars per month will be paid.

Where the charges amount to:	The Company will pay the agent:
.15 cents	.03 cents
.20 cents	.04 cents
.25 cents	.05 cents
.30 cents	.06 cents
.35 cents	.07 cents
.50 cents	.10 cents
.60 cents	.12 cents

and proportionately on C. O. D.'s in excess of $300.00.

Article 14.

No change will be made in the foregoing articles until after notice of thirty (30) days in writing, has been given.

For the Joint Agents:
(Signed) D. MAY.

For Southern Express Company:
(Signed) J. B. HOCKADAY,
(Signed) W. S. McFARLAND.

EXHIBIT "E". Sheet 1

Statement of claim by J. L. Williams for services rendered to the Railway Express Agency, Inc., at Lake Jem, Fla., station on the Seaboard Air Line Railway covering the period beginning January 1930 to and including November 30, 1939.

Claim for the difference between the amount actually paid me by the Railway Express Agency, Inc., and the amount due me under Award No. 548 (Docket TE-247) and Order dated December 15, 1937, by the Third Division of the National Railroad Adjustment Board located at Chicago, Illinois, for services performed to the Railway Express Agency, Inc., in the conduct of its business at Lake Jem, Fla., station located on the Seaboard Air Line Railway within the period January 1, 1930 to November 30, 1939, both inclusive.

Minimum Express Commission Rate. 10%.

Month	Year	Total amount of business handled	Amount paid as Commission	Amount due under Award No. 548	Difference due me
Jan.	1930	65.40	6.54	$10.00	$ 3.46
Feb.	"	80.60	8.06	10.00	1.94
Mch.	"	50.21	5.02	10.00	4.98
April	"	5.80	.58	10.00	9.42
May	"	9.22	.92	10.00	9.08
June	"	$13.39	1.34	10.00	8.66
July	"	9.00	.90	10.00	9.10
Aug.	"	None on leave absence			
Sept.	"	21.80	2.18	10.00	7.82

Month	Year	Total amount of business handled	Amount paid as Commission	Amount due under Award No. 548	Difference due me
Oct.	"	14.80	1.48	10.00	8.52
Nov.	"	99.40	9.94	10.00	.06
Dec.	"	206.90	20.69	10.00	None
Jan.	1931	161.32	16.13	10.00	None
Feb.	"	90.40	9.04	10.00	.96
Mch.	"	52.10	5.21	10.00	4.79
April	"	42.10	4.21	10.00	5.79
May	"	26.40	2.64	10.00	7.36
June	"	23.80	2.38	10.00	7.62
July	"	5.70	.57	10.00	9.43
Aug.	"	None on leave absence			
Sept.	"	12.72	1.27	10.00	8.73
Oct.	"	5.20	.52	10.00	9.48
					$117.20

J. L. WILLIAMS, Claimant.

Sworn to and subscribed before me this 6th day of December, 1939.

A. C. STUBBS,
Notary Public, State of Florida at Large.

(Notarial Seal)

Sheet #2

Statement of claim by J. L. Williams for services rendered to the Railway Express Agency, Inc., at Lake Jem, Fla., station on the Seaboard Air Line Railway covering the period beginning January 1930 to and including November 30, 1939.

Claim for the difference between the amount actually paid me by the Railway Express Agency, Inc., and the amount due me under Award No. 548 (Docket TE-247) and Order dated December 15, 1937, by the Third Division of the National Railroad Adjustment Board located at Chicago, Illinois, for services performed to the Railway Express Agency, Inc., in the conduct of its business at Lake Jem, Fla., station located on the Seaboard Air Line Railway within the period January 1, 1930 to November 30, 1939.

Minimum Express Commission Rate. 10%.

Month	Year	Total amount of business handled	Amount paid as Commission	Amount due under Award No. 548	Difference due me
				Forward Sheet 1	117.20
Nov	1931	3.90	$ .39	$10.00	9.61
Dec.	"	134.40	13.44	10.00	none
Jan.	1932	52.10	5.21	10.00	4.79
Feb.	"	54.11	5.41	10.00	4.59
Mch.	"	40.00	4.00	10.00	6.00
Apr.	"	21.50	2.15	10.00	7.85
May	"	10.30	1.03	10.00	8.97
June	"	12.60	1.26	10.00	8.74
July	"	3.10	.31	10.00	9.69
Aug.	"	None on leave absence			
Sept.	"	3.50	.35	10.00	9.65
Oct.	"	2.22	.22	10.00	9.78

Month	Year	Total amount of business handled	Amount paid as Commission	Amount due under Award No. 548	Difference due me
Nov.	"	82.70	8.27	10.00	1.73
Dec.	"	119.70	11.97	10.00	None
Jan.	1933	46.10	4.61	10.00	5.39
Feb.	"	27.61	2.76	10.00	7.24
Mch.	"	50.40	5.04	10.00	4.96
April	"	12.70	1.27	10.00	8.73
May	"	17.20	1.72	10.00	8.28
June	"	11.20	1.12	10.00	8.87
July	"	7.60	.76	10.00	9.24
Aug.	"	None on leave absence.			
Sept.	"	23.40	2.34	10.00	7.66
Oct.	"	4.20	.42	10.00	9.58
Nov.	"	20.50	2.05	10.00	7.95
Dec.	"	126.50	12.65	10.00	None
					$276.50

J. L. WILLIAMS, Claimant.

Sworn to and subscribed before me this 6th day of December, 1939.

(Notarial Seal)

A. C. STUBBS,
Notary Public, State of Florida at Large.

Statement of claim by J. L. Williams for services rendered to the Railway Express Agency, Inc., at Lake Jem, Fla., station on the Seaboard Air Line Railway covering the period beginning January 1930 to and including November 30, 1939.

Claim for the difference between the amount actually paid me by the Railway Express Agency, Inc., and the amount due me under Award No. 548 (Docket TE-247) and Order dated December 15, 1937, by the Third Division of the National Railroad Adjustment Board located at Chicago, Illinois, for services performed to the Railway Express Agency, Inc., in the conduct of its business at Lake Jem, Fla., station located on the Seaboard Air Line Railway within the period January 1, 1930 to November 30, 1939, both inclusive.

Minimum Express Commission Rate. 10%.

Month	Year	Total amount of business handled	Amount paid as Commission	Amount due under Award No. 548	Difference due me
			Amount Forward from Sheet #2		$276.50
Jan.	1934	50.80	5.08	10.00	4.92
Feb.	"	84.40	8.44	10.00	1.56
Mch.	"	85.20	8.52	10.00	1.48
April	"	40.70	4.07	10.00	5.93

Lake Jem Agency closed May 1 to Sept. 30th

Month	Year	Total amount of business handled	Amount paid as Commission	Amount due under Award No. 548	Difference due me
Oct.	1934	6.20	.62	10.00	9.38
Nov.	"	28.70	2.87	10.00	7.13
Dec.	"	126.50	12.65	10.00	None
Jan.	1935	116.80	11.68	10.00	None
Feb.	"	31.20	3.12	10.00	6.88
Mch.	"	66.70	6.67	10.00	3.33
April	"	41.10	4.11	Agency closed 4/8 nothing due	
		Station opened Nov. 5th.			
Nov.	1935	91.60	9.16	10.00	Nothing due
Dec.	"	175.00	17.50	10.00	Nothing due
Jan.	1936	129.10	12.91	10.00	Nothing due

Total amount claim 317.11

I left Lake Jem, Fla., Feb. 1st, 1936.

J. L. WILLIAMS, Claimant.

Sworn to and subscribed before me this 6th day of December, 1939.

A. C. STUBBS,

(Notarial Seal)

Notary Public, State of Florida at Large.

13 EXHIBIT "F".

Statement of claim by T. F. Womble for services rendered to the Railway Express Agency, Inc., at Apex, N. C. station on the Seaboard Air Line Railway covering the period beginning January 1930 to and including November 30, 1939.

Claim for the difference between the amount actually paid me by the Railway Express Agency, Inc., and the amount due me under Award No. 548 (Docket TE-247) and Order dated December 15, 1938, by the Third Division of the National Railroad Adjustment Board located at Chicago, Illinois, for services performed to the Railway Express Agency, Inc., in the conduct of its business at Apex N. C. station located on the Seaboard Air Line Railway within the period January 1, 1930, to November 30, 1939, both inclusive.

Transfer Allowance.

Monthly rate paid by Express Agency prior to January 1, 1930	$10.00
Monthly rate arbitrarily placed in effect	5.00

Period in which transfer service performed at reduced rate of pay—From Sept. 1, 1932 to Feby. 28, 1935.

(If more than one reduction made, or if reductions made during different periods in the different years, please so state and show periods and rate of transfer allowance arbitrarily fixed by Express Agency.)

Month and Year subsequent to January 1, 1930	Amount paid by Express Agency	Amount due under Award No. 548	Difference due me
	$150.00	$300.00	$150.00

T. F. WOMBLE, Claimant.

Sworn to and subscribed before me this 5th day of December, 1939.

MARGARET SESSONS,
(Notarial Seal) Notary Public.

14 EXHIBIT "I".

Statement of claim by T. P. Barber for services rendered to the Railway Express Agency, Inc., at Fairfax, S. C. station on the Seaboard Air Line Railway covering the period beginning January 1930 to and including November 30, 1939.

Claim for the difference between the amount actually paid me by the Railway Express Agency, Inc., and the amount due me under Award No. 548 (Docket TE-247) and Order dated December 15, 1938, by the Third Division of the National Railroad Adjustment Board, located at Chicago, Illinois, for services performed to the Railway Express Agency, Inc., in the conduct of its business at Fairfax, S. C. station located on the Seaboard Air Line Railway within the period January 1, 1930, to November 30, 1939, both inclusive.

Transfer Allowance.

Monthly rate paid by Express Agency prior to January 1, 1930	$25.00
Monthly rate arbitrarily placed in effect Oct 1st, 1932	20.00

Period in which transfer service performed at reduced rate of pay—From October 1st, 1932 to November 30th, 1939.

(If more than one reduction made, or if reductions made during different periods in the different years, please so

state and show periods and rate of transfer allowance arbitrarily fixed by Express Agency.)

Month and Year subsequent to January 1, 1930	Amount paid by Express Agency	Amount due under Award No. 548	Difference due me
	1493.80	1867.50	373.70

Above covers period:

October 1st, 1932 to November 19, 1935
May 1st, 1936 to March 31, 1937
October 1st, 1937 to November 30th, 1939.

T. P. BARBER, Claimant.

Sworn to and subscribed before me this 5 day of December, 1939.

EDWARD A. ZEIGLER,
(Notarial Seal) Notary Public.

15 EXHIBIT "N"—SHEET 20.

Summary.

Lawtey, Florida, December, 1939.

Railway Express Agency, Inc.,
To C. Dinkins

		Dr.
July 1st, 1930	To Balance due on Commission 130 cars	4163.31
July 1st, 1931	To 6% Interest for 12 Months on 4163.31	249.80
do	To Balance due on Commission 193 Cars	6277.67
do	To Amount due	10690.78
July 1st, 1932	To 6% Interest for 12 Months on 10690.78	641.45
do	To Balance due on Commission 77 Cars	2509.23
do	To Amount due	13841.46

July 1st, 1933	To 6% Interest for 1 Yr. on 13841.46		830.48
Railway Express Agency, Inc.,			
To C. Dinkins			Dr.
do	To Balance due on Commission 157 Cars		4850.23
do	To Amount due		19522.17
July 1st, 1934	To 6% Interest for 1 Yr. on 19522.17		1171.33
do	To Balance due on Commission 105 Cars		2744.99
do	To Amount due		23438.49
July 1st, 1935	To 6% Interest for 1 Yr. on 23438.49		1406.31
do	To Balance due on Commission 63 Cars		1600.92
do	To Amount due		26445.72
July 1st, 1936	To 6% Interest for 1 Yr. on 26445.72		1586.74
do	To Balance due on Commission 109 Cars		2744.02
do	To Amount due		30776.48
July 1st, 1937	To 6% Interest for 1 Yr. on 30776.48		1846.59
do	To Balance due on Commission 22 Cars		568.57
do	To Amount due		33191.64
July 1st, 1938	To 6% Interest for 1 Yr. on 33191.64		1991.50
do	To Balance due on Commission 13 Cars		362.19
do	To Amount due		35545.33

Railway Express Agency, Inc.,
To C. Dinkins

		Dr.
Dec. 31st, 1939	To 6% Interest on 35545.33 for 18 Mos.	3199.08
do	To Amount due	$38744.41

C. DINKINS, Claimant.

Sworn to and subscribed before me this 8 day of December, 1939.

OWEN J. PHILLIPS,
(Notarial Seal) Notary Public, State of Florida.

EXHIBIT "O".

Statement of claim by Paul Smith for services rendered to the Railway Express Agency, Inc., at Emory, Ga. station on the Seaboard Air Line Railway covering the period beginning January 1930 to and including November 30, 1939.

Claim for the difference between the amount actually paid me by the Railway Express Agency, Inc., and the amount due me under Award No. 548 (Docket TE-247) and Order dated December 15, 1937, by the Third Division of the National Railroad Adjustment Board located at Chicago, Illinois, for services performed to the Railway Express Agency, Inc., in the conduct of its business at Emory, Ga. station located on the Seaboard Airline Railway within the period January 1, 1930, to November 30, 1939, both inclusive.

Carload Express Shipments.

Express W/B No.	Date of Waybill	Car-Initial and Number	Commodity	Destination	Express Charges	Amount of Commission Received	Correct % Commission rate under Award 548	Amount due under Award No. 548	Difference due me
40302	Dec. 1929	* * *	.....	.....	545.55	5.00	10%	54.55	49.55
54320	Dec. 1929	.....	.....	.....	554.96	5.00	10%	55.50	50.50
101645									
101648	May 1930	(2).....	.....	.....	968.06	5.00	10%	96.80	91.80
54305	June 1930	.....	.....	.....	551.46	5.00	10%	55.15	50.15
.....	June 1930	.....	.....	.....	452.38	5.00	10%	45.24	40.24
482027	July 1930	.....	.....	.....	398.88	5.00	10%	39.89	34.89
101649	Dec. 1930	.....	.....	.....	526.59	5.00	10%	52.66	47.66
.....	June 1931	.....	.....	.....	598.64	5.00	10%	59.86	54.86
16317									
404870	Apr. 1932	.....	.....	.....	.....	....	....	....	....
	Apr. 1932	.....	.....	.....	809,90	10.00	10%	80.99	70.99
	Apr. 1932	.....	.....	.....	496.86	5.00	10%	49.69	44.69
92497	July 1932	.....	.....	.....	776.36	5.00	10%	77.64	72.64

PAUL SMITH, Claimant.

Sworn to and subscribed before me this 9th day of December, 1939.

(Notarial Seal)

F. SORIGIO,
Notary Public.

(Seal)

EXHIBIT "P".

Statement of claim by D. G. Stutz for services rendered to the Railway Express Agency, Inc., at Sou. Pines, N. C. station on the Seaboard Air Line Railway covering the period bebinning January 1930 to and including November 30, 1939.

Claim for the difference between the amount actually paid me by the Railway Express Agency, Inc., and the amount due me under Award No. 548 (Docket TE-247) and Order dated December 15, 1937, by the Third Division of the National Railroad Adjustment Board located at Chicago, Illinois, for services performed to the Railway Express Agency, Inc., in the conduct of its business at Southern Pines station located on the Seaboard Air Line Railway within the period January 1, 1930 to November 30, 1939, both inclusive.

Minimum Express Commission Rate.

Month	Year	Total amount of business handled	Amount paid as Commission	Amount due under Award No. 548	Difference due me
Dec.	1931	2,589.78	208.53	238.09	29.56
Apr.	1932	2,470.87	192.82	216.63	29.56
Dec.	1932	2,080.93	157.72	181.53	29.56
Feb.	1933	1,745.24	127.51	151.32	29.56
May	1933	1,736.70	126.74	150.55	29.56
Dec.	1933	2,220.28	170.26	194.07	29.56
Apr.	1934	2,216.83	169.89	193.70	29.56
Dec.	1934	2,520.06	203.30	227.11	29.56
Apr.	1935	2,568.76	201.63	225.44	29.56
Dec.	1935	3,155.96	225.88	289.32	63.44
Mar.	1936	Unable to locate report 1 carload Willoughby, Ohio			33.88
Apr.	1936	Unable to locate report 1 carload Millbrook, N. Y.			27.94
Dec.	1936	2,286.07	231.82	255.63	29.56
Apr.	1937	2,606.80	210.15	233.96	29.56
Oct.	1937	2,332.31	188.28	216.22	27.94
Dec.	1937	2,867.49	235.35	264.91	27.94
Jan.	1938	2,705.74	220.27	249.83	29.56
					535.86

D. G. STUTZ, Claimant.

Sworn to and subscribed before me this 9th day of December, 1939.

GARLAND A. PIERCE,
Notary Public.

(Notarial Seal) (Seal)

Month	Year	Total amount of business handled	Amount paid as Commission	Amount due under Award No. 548	Difference due me

EXHIBIT "U".

Statement of claim by H. A. Borst for services rendered to the Railway Express Agency, Inc., at Vass, N. C. station on the Seaboard Air Line Railway covering the period beginning January 1930 to and including November 30, 1939.

Claim for the difference between the amount actually paid me by the Railway Express Agency, Inc., and the amount due me under Award No. 548 (Docket TE-247) and Order dated December 15, 1937, by the Third Division of the National Railroad Adjustment Board located at Chicago, Illinois, for services performed to the Railway Express Agency, Inc., in the conduct of its business at Vass, N. C. station located on the Seaboard Airline Railway within the period January 1, 1930, to November 30, 1939, both inclusive.

Carload Express Shipments.

Express W/B No.	Date of Waybill	Car-Initial and Number	Commodity	Destination	Express Charges	Amount of Commission Received	Correct % Commission rate under Award 548	Award due under Award No. 548	Difference due me
49484	6/ 8/31	M P 3198	Dewberries	Pittsburgh, Pa.	399.50	5.00	39.95	39.95	34.95
49486	6/10/31	S S W 1567	"	Detroit, Mich.	440.30	5.00	44.03	44.03	39.03
49474	6/15/31	R I 4714	"	Boston, Mass.	428.40	5.00	42.84	42.84	37.84
49492	6/15/31	Rex 541	"	Cleveland, Ohio	428.40	5.00	42.84	42.84	37.84
49488	6/17/31	S A L 3611	"	Detroit, Mich.	440.30	5.00	44.03	44.03	39.03
49489	6/17/31	NC & St L 3913	"	Columbus, Ohio	363.80	5.00	36.38	36.38	31.38
49319	6/22/31	M P 3258	"	Detroit, Mich.	440.30	5.00	44.03	44.03	39.03
49318	6/23/31	P M 2715	"	Pittsburgh, Pa.	399.50	5.00	39.95	39.95	34.95
49322	6/ 9/34	Pa 2561	"	Buffalo, N. Y.	428.40	5.00	42.84	42.84	37.84
49324	6/11/34	Pa 3664	"	Cleveland, O.	372.20	5.00	37.22	37.22	32.22
49326	6/12/34	SAL 3628	"	Chicago, Ill.	432.18	5.00	43.22	43.22	38.22
49329	6/15/34	Pa 49329	"	Chicago, Ill.	432.18	5.00	43.22	43.22	38.22
									440.55

H. A. BORST, Claimant.

Sworn to and subscribed before me this 7 day of December, 1939.

BEN H. WOOD,
Notary Public.

(Notarial Seal)

(Seal)

Statement of claim by H. A. Borst for services rendered to the Railway Express Agency, Inc., at Vass, N. C. station on the Seaboard Air Line Railway covering the period beginning January 1930 to and including November 30, 1939.

Claim for the difference between the amount actually paid me by the Railway Express Agency, Inc., and the amount due me under Award No. 548 (Docket TE-247) and Order dated December 15, 1937, by the Third Division of the National Railroad Adjustment Board located at Chicago, Illinois, for services performed to the Railway Express Agency, Inc., in the conduct of its business at Vass, N. C. station located on the Seaboard Airline Railway within the period January 1, 1930, to November 30, 1939, both inclusive.

Carload Express Shipments.

Express W/B No.	Date of Waybill	Car-Initial and Number	Commodity	Destination	Express Charges	Amount of Commission Received	Correct % Commission rate under Award 548	Amount due under Award No. 548	Difference due me
49330	6-19-34	Pa 2757	Dewberries	Washington, D. C.	276.94	5.00	27.69	27.69	22.69
49331	6-19-34	Pa 2872	"	Cleveland, O.	372.30	5.00	37.23	37.23	32.23
49321	6-19-34	Pa 2755	"	Buffalo, N. Y.	384.55	5.00	38.45	38.45	33.45
49490	6-12-34	Pa 2566	"	Washington, D. C.	276.94	5.00	27.70	27.70	22.70
49332	6-22-34	Pa 2575	"	Washington, D. C.	276.94	5.00	27.70	27.70	22.70
49491	6-22-34	Pa 2562	"	Cleveland, O.	372.20	5.00	37.22	37.22	32.22
49333	6-29-34	Pa 2873	"	Buffalo, N. Y.	384.55	5.00	38.45	38.45	33.45
49475	6-24-34	Pa 2153	"	Detroit, Mich.	389.30	5.00	38.93	38.93	33.93
49328	6-25-34	Pa 272	"	Cleveland, O.	372.20	5.00	37.22	37.22	32.22
49398	6- 6-35	Pa 2811	"	Detroit, Mich.	403.96	5.00	40.40	40.40	35.40
49400	6-10-35	Pa 2607	"	Washington, D. C.	276.95	5.00	27.69	27.69	22.69
49394	6-10-35	Pa 7526	"	Washington, D. C.	276.95	5.00	27.69	27.69	22.69
49395	6-11-35	Pa 2865	"	Detroit, Mich	403.91	5.00	40.40	40.40	35.40
49396	6-12-35	Pa 2647	"	Washington, D. C.	276.75	5.00	27.67	27.67	22.67
49397	6- 2-36	SAL 3623	"	Buffalo, N. Y.	371.42	5.00	37.14	37.14	32.14
									436.58

H. A. BORST, Claimant.

Sworn to and subscribed before me this 7 day of December, 1939.

BEN H. WOOD,
Notary Public.

(Notarial Seal)

(Seal)

Statement of claim by H. A. Borst for services rendered to the Railway Express Agency, Inc., at Vass, N. C. station on the Seaboard Air Line Railway covering the period beginning January 1930 to and including November 30, 1939.

Claim for the difference between the amount actually paid me by the Railway Express Agency, Inc., and the amount due me under Award No. 548 (Docket TE-247) and Order dated December 15, 1937, by the Third Division of the National Railroad Adjustment Board located at Chicago, Illinois, for services performed to the Railway Express Agency, Inc., in the conduct of its business at Vass, N. C. station located on the Seaboard Airline Railway within the period January 1, 1930, to November 30, 1939, both inclusive.

Carload Express Shipments.

Express W/B No.	Date of Waybill	Car-Initial and Number	Commodity	Destination	Express Charges	Amount of Commission Received	Correct % Commission rate under Award 548	Amount due under Award No. 548	Difference due me
137986	6- 5-36	PRR 2705	Dewberries	Detroit, Mich.	396.05	5.00	39.60	39.60	34.60
137987	6- 5-36	Pa 2586	"	Buffalo, N. Y.	393.40	5.00	39.34	39.34	34.34
49392	6-13-36	Pa 2820	"	Buffalo, N. Y.	385.85	5.00	38.58	38.58	33.58
15433	6- 4-37	Pa 2574	"	Buffalo, N. Y.	449.06	5.00	44.91	44.91	39.91
154314	6- 8-37	Pa 2897	"	Buffalo, N. Y.	460.40	5.00	46.04	46.04	41.04
154316	6-11-37	Pa 2765	"	Chicago, Ill.	498.77	5.00	49.88	49.88	44.88
154317	6-12-37	Pa 2718	"	Buffalo, N. Y.	460.40	5.00	46.04	46.04	41.04
154319	6-15-37	Pa 2576	"	Washington, D. C.	272.71	5.00	27.27	27.27	22.27
154320	6-18-37	Pa 2992	"	Detroit, Mich.	477.85	5.00	47.78	47.78	42.78
154321	6-19-37	Pa 2677	"	Buffalo, N. Y.	391.41	5.00	39.14	39.14	34.14
154322	6-22-37	Pa 3812	"	Buffalo, N. Y.	460.40	5.00	46.04	46.04	41.04
195303	5 14-38	Pa 2727	"	Buffalo, N. Y.	367.20	5.00	36.72	36.72	31.72
195305	5-27-38	Pa 2586	"	Buffalo, N. Y.	418.26	5.00	41.83	41.83	36.83
195306	5-27-38	Pa 2682	"	Montreal, Canada	523.50	5.00	52.35	52.35	47.35
195307	5-28-38	Pa 2666	"	Detroit, Mich.	379.80	5.00	37.98	37.98	32.98
154392	6- 1-38	Pa 2526	"	Buffalo, N. Y.	369.53	5.00	36.95	36.95	31.95
									590.45

H. A. BORST, Claimant.

Sworn to and subscribed before me this 7 day of December, 1939.

(Notarial Seal)

BEN H. WOOD,
Notary Public.

(Seal)

21 EXHIBIT "V".

Statement of claim by C. F. Carlton for services rendered to the Railway Express Agency, Inc., at Boykins, Va. station on the Seaboard Air Line Railway covering the period beginning January 1930 to and including November 30, 1939.

Claim for the difference between the amount actually paid me by the Railway Express Agency, Inc., and the amount due me under Award No. 548 (Docket TE-247) and Order dated December 15, 1938, by the Third Division of the National Railroad Adjustment Board located at Chicago, Illinois, for services performed to the Railway Express Agency, Inc., in the conduct of its business at Boykins, Va. station located on the Seaboard Air Line Railway within the period January 1, 1930, to November 30, 1939, both inclusive.

Transfer Allowance.

Monthly rate paid by Express Agency prior to January 1, 1930	$25...
Monthly rate arbitrarily placed in effect	$20.00 & 15.00

Period in which transfer service performed at reduced rate of pay—From March 1, 1922 to Sept. 15th, 1937.

(If more than one reduction made, or if reductions made during different periods in the different years, please so state and show periods and rate of transfer allowance arbitrarily fixed by Express Agency.)

Month and Year subsequent to January 1, 1930	Amount paid by Express Agency	Amount due under Award No. 548	Difference due me
3/1/1922	$20.00	$25.00	
to Inc.			
4/30/1924			
6/1/1924			
to Inc.			
12/31/1929	93 months @ $5.00 per month		$465.00
1/1/1930			
to Inc.			
8/31/32	$20.00	$25.00	
	32 months @ $5.00 per month		$160.00
9/1/1932			
to Inc.			
9/15/1937	15.00	25.00	
	60½ months @ $10.00 per month		$605.00
	Grand total due		$1230.00

C. F. CARLTON, Claimant.

Sworn to and subscribed before me this 6th day of December, 1939.

H. T. SMITH,
Notary Public.

(Notarial Seal)

EXHIBIT "X".

Statement of claim by E. Meares for services rendered to the Railway Express Agency, Inc., at McBee, S. C. station on the Seaboard Air Line Railway covering the period beginning January 1930 to and including November 30, 1939.

Claim for the difference between the amount actually paid me by the Railway Express Agency, Inc., and the amount due me under Award No. 548 (Docket TE-247) and Order dated December 15, 1937, by the Third Division of the National Railroad Adjustment Board located at Chicago, Illinois, for services performed to the Railway Express Agency, Inc., in the conduct of its business at McBee, S. C. station located on the Seaboard Airline Railway within the period January 1, 1930, to November 30, 1939, both inclusive.

Carload Express Shipments.

Express W/B No.	Date of Waybill	Car-Initial and Number	Commodity	Destination	Express Charges	Amount of Commission Received	Correct % Commission rate under Award 548	Amount due under Award No. 548	Difference due me
	June 1930	SAL 3634	Dewberries	Washington, D. C.	350.00	5.00	10%	35.00	30.00
	June 1930	MKT 1239	Dewberries	Washington, D. C.	350.00	5.00	10%	35.00	30.00
	July 1930	SAL 2594	Peaches	Washington, D. C.	350.00	5.00	10%	35.00	30.00
	June 1931	REX 543	D. Berries	Washington, D. C.	350.00	5.00	10%	35.00	30.00
	June 1932	PRR 2773	D. Berries	Washington, D. C.	350.00	5.00	10%	35.00	30.00
	June 1932	PRR 2577	D. Berries	Washington, D. C.	350.00	5.00	10%	35.00	30.00
	June 1932	PRR 2588	D. Berries	Washington, D. C.	350.00	5.00	10%	35.00	30.00
	June 1932	PRR 2369	D. Berries	Washington, D. C.	350.00	5.00	10%	35.00	30.00
	June 1932	SAL 3612	D. Berries	Washington, D. C.	350.00	5.00	10%	35.00	30.00
								315.00	270.00

Note these cars billed for Diversion.

E. MEARES, Claimant.

Sworn to and subscribed before me this 11 day of December, 1939.

D. G. McPHERSON,
Notary Public.

(Notarial Seal)

(Seal)

23 ANSWER.

(Title Omitted.)

Now comes Railway Express Agency, Incorporated, the defendant named in this complaint, and files this its answer and shows respectfully as follows:

1.

The allegations of paragraph one are admitted.

2.

Answering the allegations of paragraph two, defendant admits that it operates through the Northern District of Georgia. While admitting that plaintiff has by this complaint brought its action to enforce the Order described in the remainder of paragraph 2, defendant denies that this plaintiff has any right to maintain this suit, even though the award referred to was in its favor.

3.

The allegations of paragraph three of the complaint are admitted.

4.

The allegations of paragraph four are admitted.

5.

Defendant denies the allegations of paragraph five of the complaint, except that it admits (a) that the Third Division of the National Railroad Adjustment Board sus-

tained a certain claim of the plaintiff, then a petitioner before the said Board, which claim was as follows:

"1. The commission rate on carload express shipments accruing to the joint railway-express agent at Lawtey, Fla., as established by Article 2 of the Express Agreement of Aug. 1, 1917, and at all other joint agencies on Seaboard Air Line handling carload express shipments, shall be restored as of the date the rate was arbitrarily reduced.

"2. That the minimum amount of commission of ten dollars ($10.00) per month, as established and guaranteed by Article 2 of the Express Agreement of Aug. 1, 1917, shall be restored to the joint railway-express agency at Rutherford, Ala., and at all other joint railway-express agencies where the minimum rate has been arbitrarily reduced or reduced through individual agreement between the express company and agent; and that these agents be retroactively reimbursed in the amount of the difference that should have been paid under the express agreement.

"3. That all transfer allowances established by Article 3 of the Express Agreement of Aug. 1, 1917, and higher rates in effect which have been arbitrarily changed, or changed by individual agreement, as at Moncure, N. C., shall be restored retroactively to the date such changes were made in violation of the Express Agreement, and all agents affected be paid the difference due them under the Express Agreement."

and (b) that Exhibit B of the complaint is a true and correct copy of a contract, dated August 1, 1917, between the Southern Express Company and one "D. May" who purported to act for a group of persons designated as "Joint Agents."

6.

In answer to paragraph six of the complaint, defendant says that the quoted portion thereof, being the three numbered paragraphs set forth therein, is the claim of plaintiff, then a petitioner before the National Railroad Adjustment Board, which the said Board sustained by an Award, bearing number 548, made on December 15, 1937, and which Award the said Board, by an order of even date, directed this defendant to make effective on or before March 16, 1938.

7.

Defendant denies paragraph 7 of the complaint.

8.

In answer to paragraph eight of the complaint defendant denies there is due the individual agents named the several sums alleged by the plaintiff to be due to them, and it denies that it is indebted to the named individuals, or to the plaintiff for their benefit, in the several sums stated in said paragraph and in the sworn statements, being Exhibits C to X attached to the complaint, and defendant denies that it is indebted to the several persons named in said paragraph, or to the plaintiff for their benefit, in any sum whatsoever.

9.

Answering paragraph nine defendant admits that it has failed, in the sense that it has refused, to comply with the order of the said Board, but it denies that it should be required to do so.

10.

Defendant, in answer to paragraph ten, says that plaintiff is not entitled to any sum as attorney's fee.

Separate Defenses.

For further answer to plaintiff's complaint and as a further and separate defense, this defendant shows:

11.

That the National Railroad Adjustment Board had no jurisdiction in the premises to make Award No. 548, and to issue the order of December 15, 1937, for that at no time has there ever existed the relation of employer and employee between this defendant, as a carrier defined by Section 1 of the Railway Labor Act (Title 45, Sec. 151, U. S. C. A.), and the joint agents, in whose behalf plaintiff petitioned said Adjustment Board, and for the benefit of whom the Award is said to have been made. Said joint agents were not, nor have they ever been, employees of defendant within the meaning of Section 1 of said Railway Labor Act. Defendant shows that, never having acquired any jurisdiction to make an award, because the dispute upon which the award and order of said Board was predicated was not between this defendant and an employee or group of employees of this defendant, the Board had no authority and the purported award and the order to make the same effective are nugatory, illegal, void and of no effect, and cannot form the basis of any suit to enforce the same by mandamus or otherwise.

For further answer and as a second defense, defendant shows:

12.

If there was a relationship of employer and employee between this defendant and its joint commission agents, which this defendant denies, still the plaintiff has no right to the relief sought in this case for that the award of the National Railroad Adjustment Board and the order to make the same effective, which the plaintiff seeks to enforce by this proceeding, were not made upon a petition which referred to the said Adjustment Board a pending and unadjusted dispute between defendant and said joint commission agents growing out of grievances or out of the interpretation or application of an agreement concerning rates of pay. Defendant says that no such dispute between it and said joint commission agents was pending and unadjusted on June 21, 1934, nor has such dispute arisen since that date. Because the power and jurisdiction of the said Board to make an award and an order thereon is dependent upon the existence of a pending and unadjusted dispute on June 21, 1934, or a dispute arising subsequent thereto and, as neither of these things did in fact exist as a basis for Award No. 548, said award and the order of the said Board, dated December 15, 1937, requiring this defendant to make the same effective, are nugatory, void and of no effect whatever, and are incapable of being enforced in this action.

For further answer and as a third separate defense, defendant shows:

13.

That Award Number 548, which the National Railroad Adjustment Board ordered this defendant to make effective by its order dated December 15, 1937, sustains the contention of the plaintiff, then the petitioner before the

said Board, that a certain contract between the Joint Agents and Southern Express Company, dated August 1, 1917, (Exhibit B of the complaint), was and is binding upon this defendant. This finding and holding of the said Board was necessarily the basis of the Award. Defendant says that the facts are that it is not, nor was it ever, bound by the terms and conditions of the aforesaid contract. The decision of the said Board that said contract was binding upon it is contrary to the evidence and without any evidence to support it and is arbitrary and unreasonable and contrary to law.

14.

That the said Board of Adjustment, having found and decided that this defendant was bound by the terms of the aforesaid contract between the Joint Agents and the Southern Express Company, found further that this defendant had breached said contract by paying to certain of its joint agents commissions and allowances at variance with those established by the aforesaid contract. The order of December 15, 1937, which the plaintiff by this action seeks to enforce, is in effect a command to defendant to pay to each of the joint agents affected thereby a sum equal to the difference between commissions and allowances calculated according to the Joint Agents-Southern Express Company contract of August 1, 1917, and those commissions and allowances actually paid by this defendant to said joint agents. By paragraph seven of the complaint the plaintiffs set forth the total amount so calculated, which it alleges the defendant should be required to pay to all joint agents, and by paragraph eight it shows the amount so calculated which it says is due each joint agent under the terms of the order of the said Adjustment Board. Defendant says that the said order of the Adjustment Board, commanding this de-

fendant to pay commissions and allowances to its joint agents, calculated according to the terms of the contract of August 1, 1917, is arbitrary, unreasonable, void and of no effect, being based, as it is, upon a holding and finding that this defendant is or ever was bound by said contract.

15.

Defendant shows that it does not owe the total sum stated in paragraph seven of the complaint, nor does it owe to the several persons named in paragraph eight thereof the sums set opposite their names. The total figure set up in paragraph seven and the various amounts stated in paragraph eight represent the plaintiff's computation of the sum that is due collectively and the sums due individually to its joint agents. These figures are arrived at by subtracting from the amount of commissions and allowances reckoned according to the requirements of the Joint Agent-Southern Express Company contract of August 1, 1917, the amount of commissions and allowances actually paid by this defendant to those twenty-two joint agents named in paragraph eight of the complaint. Defendant says that it was not, nor has it ever been, bound by the aforesaid contract of August 1, 1917, and that the various sums which it has paid to the twenty-two joint agents named in said paragraph eight, covering their commissions and allowances, are precisely those sums which it owed to and was due these joint agents as commissions and allowances by virtue of contracts made severally and separately with each of them by this defendant. This defendant owes them nothing more.

For further answer and for a fourth separate defense, defendant shows:

16.

That even if it is bound by the contract between the Joint Agents and the Southern Express Company, dated August 1, 1917, and even if the order of the National Railroad Adjustment Board of December 15, 1937, is in other respects legal and is enforceable in this proceeding, all of which defendant denies, yet, by no order or judgment of this Court should this defendant be required to pay to C. Dinkins of Lawtey, Florida, or the plaintiff for his benefit, the sum of $38,744.41 or any other sum whatsoever. Defendant does not owe said sum to said Dinkins, nor to the plaintiff for his benefit, by reason of the following facts:

Lawtey, Florida, is a large strawberry shipping point on the lines of railroad of the Seaboard Air Line. In 1930 and for many years prior to that time, and continuously until the summer of 1938, said Dinkins has been a joint railway-express agent at Lawtey. Prior to 1930 the contract between this defendant and the Seaboard Air Line Railway, pertaining to the conduct by defendant of the express business on the lines of the Seaboard, contained a provision which excluded from the business to be handled by this defendant in express service car lot movement of perishables under refrigeration. The said agreement between the railroad and this defendant reserved such business to the railroad. It was not express traffic. In 1929 the Interstate Commerce Commission, after extensive hearings, ordered the Seaboard Air Line to increase the speed of car lot movements of strawberries from the Florida shipping points to market points and to make delivery of these refrigerated cars within the time usually required in passenger train operation. The Seaboard chose to comply with this order by modifying its contract with this defendant so as to include within

the commodities which this defendant was to move in express service, car lots of strawberries moving under refrigeration. Before the amended agreement with the railroad touching this new traffic became effective, defendant notified the said C. Dinkins, then the joint railroad-express agent at Lawtey, that because of this change in the transportation medium by which cars of strawberries were thenceforward to be moved, this defendant would no longer maintain a joint agent with the railroad at Lawtey; but would install its own exclusive agent at that point and compensate him upon a salary basis. Defendant had a right to make this change in the character of its representation at Lawtey.

Defendant shows that when C. Dinkins was apprised of defendant's purpose to discontinue the joint agent arrangement at Lawtey and to create thereat a salaried office, he advised defendant that, if defendant would not make this change, he, the said Dinkins would continue to act as joint agent and would make a separate agreement with defendant respecting the compensation to be paid him for the handling in express service of car lots of strawberries under refrigeration. He offered to handle these, not on a commission basis, but at a flat rate of $5.00 per car.

Defendant accepted the offer of the said Dinkins and from and after March, 1930, when the first car lots of berries began to move out of Lawtey in express service, to and including the times mentioned in Exhibit N of the complaint, it paid to the said Dinkins $5.00 per car in exact accord with its agreement so to do.

The sum of $38,744.41 alleged by plaintiff as being the sum due C. Dinkins of Lawtey, Florida, is arrived at by computing the amount which would have been payable had he earned as his commissions 7% of the ex-

press charges on each car of berries shipped from Lawtey, and subtracting therefrom the sum of $5.00 actually paid said Dinkins by this defendant. Defendant says that this sum is not due or owing by it because: (a) This carload strawberry business was not "express business" in 1917 when the Joint Agent-Southern Express Company contract was negotiated and was not, within the purview of that contract, any part of the "business received and forwarded" upon which a commission would be paid to joint agents. (b) Defendant was free in any circumstances, and especially under the circumstances herein set forth, to make a separate, independent agreement with its joint agent at Lawtey, Florida, respecting the compensation which it would be willing to pay and he would be willing to receive for his services as an express agent in handling carload shipments of berries moving out of Lawtey—and this regardless of the existence, as a contract binding upon it, of the agreement of August 1, 1917.

17.

Defendant says that the several amounts stated in paragraph eight of the complaint to be due by defendant to persons named therein are not due by it, nor is defendant indebted to such persons in those sums or in any other sums whatever, for that, even though the said contract between Joint Agents and Southern Express Company of August 1, 1917, is binding upon this defendant, which is denied, yet defendant was free to make contracts with individual joint agents regarding commissions and allowances to be paid to them for handling express business at the stations where such persons served as railroad agents. Defendant shows that the sums alleged to be due the several persons listed in paragraph eight (except C. Dinkins) are arrived at by computing what would have been payable to each of such persons had they been recompensed for the work done for defendant according to

the provisions in the contract respecting the minimum amount of commissions payable and the transfer allowances established therein, and deducting therefrom the moneys actually paid by defendant to these persons for express work, including transfer allowances, over the period and in the manner set out in Exhibits C to X of the complaint. The difference is the amount claimed in this suit. Defendant says that these several sums are not owing by it, either to the persons named or to the plaintiff for their benefit, for that it has paid to each of the persons named in paragraph eight the exact amount of commissions earned and transfer allowances due them according to the several and separate contracts existing between defendant and these persons.

For further answer and for a fifth separate defense, defendant says:

18.

That the plaintiff is not the proper party to bring and maintain this action. If anyone can institute a suit to enforce the order of the National Railroad Adjustment Board to make effective Award numbered 548, it would be the several joint agents for whose benefit the award was made, suing in their individual capacity.

19.

Defendant shows that this present action is in legal effect a suit to recover commissions and allowances due under a written contract. Plaintiff is not a party to that contract. It was not executed for its benefit. Rather, it is claimed that plaintiff negotiated the contract for the benefit of the joint agents, some of whom are named in paragraph eight of the complaint. Plaintiff has no standing in Court.

For further answer and as a sixth separate offense to this action, defendant shows:

20.

That if the present action is one which seeks to recover damages for the breach of a written contract, to-wit, the Joint Agent-Southern Express Agreement of August 1, 1917, or, for that matter, regardless of how this action may be characterized, all of the several sums set forth in Exhibits C to X which bear date prior to December 13, 1933, are barred by the Statute of Limitations of the State of Georgia, which said statute this defendant now specially and affirmatively pleads and relies upon as a defense as against all such items.

For a further and a seventh separate defense, this defendant shows:

21.

That under subsection (p) of Section 3 of the Railway Labor Act (Title 45, Sec. 153(p), U. S. C. A.) the petitioner in proceedings before the Adjustment Board, upon failure of a carrier to comply with an order of the said Board, may become a plaintiff in a District Court of the United States, wherein he may claim relief in the premises. In such a Court action petitioner is exempted from the payment of Court costs, but the defending carrier is not so exempted. If petitioner finally prevails in the suit he shall be allowed a reasonable attorney's fee to be taxed as part of the costs of the suit. No such allowance is made in favor of the carrier if it prevails. No provision is made anywhere in the Railway Labor Act authorizing the carrier to bring suit or take any Court action to set aside or review any award or order of the

said Adjustment Board, while, at the same time, Title 45, Sec. 153 (p), U. S. C. A., gives to the findings and order of the said Board, when sought to be enforced in said District Court against the carrier, prima facie presumption of correctness. For these reasons and because of these facts, defendant says that Title 45, Sec. 153 (p), U. S. C. A., is unconstitutional and therefore void in that it deprives defendant of its property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

For further answer and an eighth separate defense, defendant shows:

That Award Number 548 of the National Railroad Adjustment Board and the order of December 15, 1937, which the plaintiff seeks to enforce in this action, are void, arbitrary and of no effect or validity for that:

(a) There were not sufficient findings of fact made by the said Board to support its award, nor do the findings of fact made by the Board support the award;

(b) There was no substantial evidence before the Board which supports or authorizes the finding, decision, opinion, award or order of the said Board to the effect that:

(1) An employer-employee relation, within the meaning of the Railway Labor Act, existed between defendant and joint railway-express agents.

(2) This defendant was bound by the Joint Agents-Southern Express Company contract of August 1, 1917.

(3) This contract was breached by this defendant when it made separate and different compensation arrangements with certain joint railway-express agents.

(4) There was any pending dispute between defendant and its joint agents at the time of the enactment of the aforesaid Railway Labor Act which gave the National Railroad Adjustment Board jurisdiction to make an award or issue an order thereon.

Wherefore, having fully answered this defendant demands judgment in its favor, together with costs and the disbursements of this action.

A. M. HARTUNG,
BLAIR FOSTER,
Attorneys for Defendant, Railway Express Agency, Incorporated.

I, Blair Foster, certify that I have this day served the within and foregoing answer by mailing copy thereof in an envelope properly stamped and addressed to William G. McRae, Esq., 704 First National Bank Building, Atlanta, Georgia.

This 19th day of January, 1940.

BLAIR FOSTER.

Filed Jan. 20, 1940.

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34 AMENDMENT.

(Title Omitted.)

Comes now Railway Express Agency, Incorporated, the defendant in the cause above stated, and with leave of the Court first had and obtained files this its amendment

to its answer heretofore filed herein, and for ground of such amendment shows:

1.

Defendant strikes in its entirety that paragraph of its answer, being numbered twenty-one (21) and being its seventh separate defense, wherein defendant challenges the constitutionality of the Railway Labor Act (Title 45, Section 153, sub-section p, U. C. S. A.).

Wherefore defendant prays that this its amendment be allowed and ordered filed.

BLAIR FOSTER,
Attorney for defendant, Railway Express Agency, Incorporated.

Read, considered, allowed and ordered filed. This 24th day of June, 1940.

E. MARVIN UNDERWOOD,
United States Judge.

Georgia,
Fulton County.

I, Blair Foster, certify that I have this day mailed a copy of the within and foregoing Amendment to the attorney for the plaintiff, William G. McRae, Esquire, at his office address in the First National Bank Building, Atlanta, Georgia.

This the 24th day of June 1940.

BLAIR FOSTER.

Filed Jun. 24, 1940.

35 SECOND AMENDMENT.

(Title Omitted.)

Comes now Railway Express Agency, Incorporated, the defendant in the cause above stated, and with leave of the Court first had and obtained files this its amendment to its answer heretofore filed herein, and for ground of such amendment shows:

1.

Defendant strikes in its entirety that paragraph of its answer numbered 11 and being its first Separate Defense and wherein defendant alleges that at no time has there ever existed the relation of employer and employee between the defendant and the joint agents.

2.

Defendant likewise strikes in its entirety paragraphs 18 and 19 of its answer, constituting its fifth Separate Defense, wherein the defendant alleged that the plaintiff was not the proper party to bring and maintain this action.

3.

Defendant amends paragraph 12 of its answeer by adding the words "or case" after the words "unadjusted dispute" in line 9 of said paragraph; and by striking the word "dispute" where the same appears as the last one in line 12 and substituting in lieu thereof the word "case;" and by striking the word "dispute", being the second word in line 18 of said paragraph, and substituting the word "case," so that said paragraph as amended shall read:

"If there was a relationship of employer and employee between this defendant and its joint commission agents, still the plaintiff has no right to the relief sought in this case for that the award of the National Railroad Adjustment Board and the order to make the same effective, which the plaintiff seeks to enforce by this proceeding, were not made upon a petition which referred to the said Adjustment Board a pending and unadjusted dispute or case between defendant and said joint commission agents growing out of grievances or out of the interpretation or application of an agreement concerning rates of pay. Defendant says that no such case between it and said joint commission agents was pending and unadjusted on June 21, 1934, nor has such dispute arisen since that date. Because the power and jurisdiction of the said Board to make an award and an order thereon is dependent upon the existence of a pending and unadjusted case on June 21, 1934, or a dispute arising subsequent thereto and, as neither of these things did in fact exist as a basis for Award Number 548, said award and the order of the said Board, dated December 15, 1937, requiring this defendant to make the same effective, are nugatory, void and of no effect whatever, and are incapable of being enforced in this action."

4.

Defendant amends paragraph 22 of its answer by striking the word "dispute" appearing in the first line of subparagraph (b) (4) and inserting in lieu thereof the word "case", so that as amended this sub-section of paragraph 22 of the answer shall read:

"There was any pending case between the defendant and its joint agents at the time of the enactment of the aforesaid Railway Labor Act which gave the National Rail-

road Adjustment Board jurisdiction to make an award or issue an order thereon."

Wherefore defendant prays that this its amendment be allowed and ordered filed.

BLAIR FOSTER,
Attorney for defendant, Railway Express Agency, Incorporated.

Read, considered, allowed and ordered filed.

This 8th day of July, 1941.

ROBERT L. RUSSELL,
United States Judge.

Filed Jul. 8, 1941.

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37 CONDENSED STATEMENT OF THE EVIDENCE, NARRATIVE FORM.

(Title Omitted.)

The above case coming on to be heard before the Honorable Robert L. Russell, United States District Judge, for the determination of questions of fact and law, it was agreed between counsel for the plaintiff and counsel for the defendant that this is a proceeding upon an award, and comes before the District Court carrying the prima facie imprint of validity upon the award, and that the burden of proof is upon the defendant to sustain its defenses. Defendant's counsel read to the Court a stipulation entered into by the parties covering many of the pertinent and material facts involved in the litigation. In

connection with this stipulation, and as a part thereof, there were filed with the Court the various exhibits referred to in the stipulation, these having been bound together in book form for the ready and convenient use of the Court. The stipulation as read to the District Judge and filed with the Court is reproducd here under the caption "The Stipulation of Facts". It is set forth in ful as it will not permit of further abbreviation. The documents and exhibits mentioned in the stipulation have been abridged by omitting all formal and irrelevant portions thereof. So condensed they appear in this narrative statement under the heading "Exhibits referred to in Stipulation."

The Stipulation of Facts.

In October, 1935, E. J. Manion, President of The Order of Railroad Telegraphers,* forwarded to National Railroad Adjustment Board*, Division 3, advance notice upon the part of R. F. Thompson, General Chairman of The Order of Railroad Telegraphers, on the Seaboard Air Line Railway, of his intention to file with the Board in ex parte what was termed "a dispute existing between his Committee and the Railway Express Agency, Incorporated*". Attached to the letter of President Manion was the "advance notice" referred to which under a date line of October 8, 1935, was in the form of a letter addressed to the Secretary of the Board and signed "R. F. Thompson, General Chairman, Seaboard Air Line, System Division #28." Copy of this advance notice as thus lodged with the Board is attached to this stipulation and identified as "Exhibit No. 1" hereof.

*Note:—For the sake of brevity The Order of Railroad Telegraphers will be referred to herein, clarity permitting, as "The O. R. T." and for the same reason, whenever possible to do so, the National Railroad Adjustment Board will be called the "Board" and Railway Express Agency, Incorporated, will be referred to as the "Agency".

Thereafter, accompanied by a letter dated November 7, 1935, President Manion transmitted to the Board an appeal filed by Chairman Thompson which he said in his letter to the Board covered "an unadjusted dispute existing between" the Committee of which R. F. Thompson was Chairman and the Agency. Copy of this letter of President Manion is attached as "Exhibit No. 2" hereof. "Exhibit No. 3" hereof is a copy of the appeal itself as filed with the Board. It contains seven pages and nine Exhibits which are lettered "A" through "N" inclusive.

On November 22, 1935, L. R. Gwyn, Chairman of the Committee on Wages and Working Conditions of Railway Express Agency, Inc., wrote to the Board a letter in which he challenged the jurisdiction of the Board to hear and determine the matters presented in the appeal of the O. R. T. Copy of this letter making issues on jurisdictional grounds is attached as "Exhibit No. 4" hereof.

The Board set February 19, 1936, as the time and Chicago as the place at which it would conduct a hearing for the purpose of determining the Board's jurisdiction in the premises. This was the sole issue to be considered. The matter was given the number "TE-247" as a docket number by the Board. The O. R. T. filed with the Board what it denominated as a "Brief." The Agency filed what it called "Memorandum of Facts and Argument".

Proceedings before the Board are informal to the extent that testimony in the sense of evidence given under oath is not usually received. The Board generally acts upon unsworn statements contained in "pleadings", "oral presentation", "briefs" or "memoranda" filed with it. Such statements so appearing become part of the record before the Board and are considered by it in making its judgments and decisions.

This rule of the Board was applied in the present instance and in order fully to inform this Court of the matters and things which were before the Board in the case subjudice it will be impossible to cull from the aforementioned "Brief" and "Memorandum" that which is pure argument and set the remainder forth as factual data which influenced or tended to influence the Board in reaching a conclusion as to whether it had or did not have jurisdiction. Nevertheless, citation of authorities have been omitted as have also quotations from cases and arguments which relate only to principles to be deduced from the decisions. So deleted "Exhibit No. 5" is the "Brief" filed by the O. R. T. and "Exhibit No. 6" is the "Memorandum" filed by the Agency.

In response to the "Memorandum" (Exhibit 6 hereof) the O. R. T. filed what it called a "Surrebuttal" and thereupon the Agency filed a "Reply". Both of these, sheared of citations, quotations and some argument, are attached hereto as "Exhibit No. 7" (Surrebuttal) and "Exhibit No. 8" (Reply) respectively. What was said in respect to statements appearing in the "Brief" and the "Memorandum" apply to these two Exhibits.

Thereafter, and upon the 17th day of September, 1936, the Board made an award called "Award No. 298, Docket TE-247". It found against the contentions of the Agency and in favor of the O. R. T. on the question of its jurisdiction. It ordered that "the case be heard on its merits". Copy of the Award is attached as "Exhibit No. 9" hereof.

Accordingly, the Agency filed its "Response", a document of twenty-two pages including Exhibit A thereof. Incorporated in this response are affidavits of W. W. Owens and L. R. Gwyn. These affidavits were also read into the record by the said Owens and the said Gwyn.

Copy of this pleading is attached as "Exhibit No. 10" hereof.

Following this "Response" the O. R. T. filed with the Board what it termed an "Oral Argument" which was a writing of twenty-five pages. In answer to this the Agency filed its "Answer to Oral Argument", a paper of five pages in length. Finally the O. R. T. lodged with the Board a "Reply to the Answer" of the Agency. These three documents have been stripped of citations and quotations from cases and some argument and the statements remaining are to be taken as part of the record which was before the Board and as data and material considered by it in arriving at a decision of the case. Thus abbreviated the "Oral Argument" becomes "Exhibit No. 11"; "Answer to Oral Argument" "Exhibit No. 12"; and the "Reply" "Exhibit No. 13".

Thereupon, and on the 15th day of December, 1937, the Board made an award sustaining the claim of the O. R. T. To this award there was a dissent. Copy of the award which bears number 548, Docket TE-247, and of the dissent together with the order of the Board directing the Agency to make the same effective is attached as "Exhibit No. 14" hereof.

All of the above and foregoing is stipulated to be the full and complete record of the proceedings before the National Railroad Adjustment Board which eventuated in the award and order of the said Board of December 15, 1937, which The Order of Railroad Telegraphers is undertaking to enforce in this action.

The parties do now and hereby agree that the following facts are true and are for all purposes in the present case to be taken as true:

1. An agreement, being Exhibit B of the Complaint, was duly executed between Southern Express Company and one D. May who acted for and in behalf of the joint Railway-Express agents on Seaboard Air Line Railway. This agreement was in effect from its date, August 1, 1917, to the date, July 1, 1918, when Southern Express Company ceased to do an express transportation business. Two earlier agreements between Southern Express Company and joint Railway-Express agents had been in effect. The first of these became effective July 1, 1909, and the second June 1, 1912. These appear as Exhibits A and B to the appeal filed with the Board (Exhibit No. 3 hereof). Both of these agreements were superseded by the agreement of August 1, 1917.

2. That Employes' Exhibit "J" to the appeal is a true and correct copy of the memorandum of agreement between the Director General of Railroads and the several Express companies, including the Southern Express Company, named as parties thereto. (With respect to Exhibit "A" referred to in the memorandum as attached thereto, see paragraphs 11 and 11A of this stipulation.)

3. That Employes' Exhibit "K" to the appeal is a true and correct copy of the opinion and the order thereon "In the matter of Application for Consolidation of Express Companies" decided December 7, 1920, by the Interstate Commerce Commission.

4. That Employes' Exhibit "L" to the Appeal is a true and correct copy of an agreement between American Railway Express Company and the certain persons named therein as agents for the participating railroads which would include the Seaboard Air Line Railway.

4A. In the order of their succession to the express business on the line of railroad known as the Seaboard Air Line, the Express companies which carried on this business are as follows:

Southern Express Company, a Georgia corporation from and prior to June 1, 1908, to, but not including, July 1, 1918.

American Railway Express Company, a Delaware corporation, from July 1, 1918, to, but not including, March 1, 1929.

Railway Express Agency, Incorporated, a Delaware corporation, from March 1, 1929, to the present date.

Each of the above named corporations is a separate and distinct corporate entity.

4B. That the facts set forth in "Securities and Acquisition of Control of Railway Express Agency, Incorporated" as the same appear in 150 I. C. C. at p. 423, et seq., are true and that decision may be referred to for any fact pertinent to the present case as fully as though a copy thereof was properly in evidence herein.

5. That the facts recited in the four sworn statements grouped as Exhibit "M" of the Appeal, being affidavits of D. May, W. S. Tidwell, B. N. Radgett and R. F. Thompson, are true, insofar as they show that no such notices as are described therein were served on any of the aforesaid persons as General Chairman of the Order of Railroad Telegraphers.

6. That the five letters which comprise Exhibit "D" of the Appeal were written, mailed, and received by the addressees.

7. That in 1930 A. B. Scruggs, a Superintendent of Railway Express Agency, and R. H. May, another Superintendent of the Agency, had jurisdiction of all of the lines of the Seaboard Air Line Railway over which the Agency operated. The jurisdiction of Scruggs was over the southern part of the railroad, while that of May was over the northern end. Between them they exercised jurisdiction over express matters throughout the entire Seaboard system.

8. On March 25, 1930, Superintendent Scruggs notified all joint railroad-express agents under his supervision, which included such agents on the Seaboard Air Line, that on and after April 10, 1930, the compensation which the Express Company would pay for handling a carload shipment by express would be $5.00 per car. A similar notice was given by Superintendent May to all joint railroad-express agents in his territory, and this included such agents located on the Seaboard Air Line.

Copies of the notices which were thus given to each joint railroad-express agent are correctly set forth as Exhibit "E" of the Appeal, the notice from Scruggs being dated March 25, 1930, while that which May gave bears date of April 8, 1930.

9. That prior to his notice of March 25, 1930 (paragraph 8 hereof), Superintendent Scruggs on the 20th day of December, 1929, notified every joint railroad-express agent in his division who was located at any point from which strawberries could be expected to move in carload lots that the compensation which the Agency would pay to such joint agent for the handling of such business would be $5.00 per car. Copy of this notification is attached hereto as "Exhibit No. 14A" hereof. This notice went to

the joint agent at Lawtey, Florida, as well as joint agents at:

Hampton, Florida
Turkey Creek, Florida,
Sydney, Florida
Valrico, Florida
Durant, Florida
Balm, Florida
Wimauma, Florida
Auburndale, Florida
Polk City, Florida
Winter Garden, Florida
Winter Haven, Florida
Berry's Spur, Florida

10. "Exhibit No. 15," "Exhibit No. 15A" and "Exhibit No. 16" hereof are true copies of the express operations which were, and in the case of "Exhibit No. 16" still is, in effect between the several railroads (including the Seaboard Air Line) and the American Railway Express Company (Exhibit No. 15) and Railway Express Agency, Incorporated (Exhibit No. 16).

11. "Memorandum of Agreement between the United States and Express Companies," made and entered into June 21, 1918, a copy of which appears as Exhibit "1" to the Agency's Memorandum of Facts (Exhibit No. 6 hereof) is a true and correct copy of the agreement referred to and may be considered as fully in evidence in the present case as though the original had been duly identified and introduced and received as documentary evidence in this cause.

11A. On June 26, 1918, the Director General of Railroads and the American Railway Express Company did

execute the agreement attached to "Exhibit No. 6" hereof and referred to therein as "Exhibit 1" thereof.

12. Railway Express Agency has never included commission agents among its employees in its reports to the Interstate Commerce Commission which are made on forms prescribed by the Commission, but it is not agreed that the Agency is not required by law to do so. Appendix A and Appendix B attached to Reply of Railway Express Agency are true and correct copies of reports made by the Agency to the Interstate Commerce Commission on forms prescribed by the Commission.

13. The decision of the Interstate Commerce Commission in "Transportation of Strawberries by Express, etc.", reported in 151 I. C. C. at p. 553, is to be considered as part of the record in the present case as fully and completely as though copy thereof, duly authenticated, had been offered and received in evidence.

In Paragraph 8 of its complaint, petitioner has listed twenty-two employees who acted as joint railroad-express agents at sixteen stations and has stated opposite the name of each employee an amount which it alleges is due such individual employee under the terms of the order of the Board. The complete list restated by stations and regrouped by employees in the order of their employment at such station is as follows:

I. Fairfax, South Carolina
   1. T. P. Barber
   2. W. J. Benton
   3. L. F. Johnson

II. Wattsville, Alabama
   4. M. J. Stokes

III. Lake Gem, Florida
5. J. L. Williams

IV. Appex, North Carolina
6. T. F. Womble

V. Councils, North Carolina
7. C. B. Holmes

VI. Emory, Georgia
8. Paul Smith
9. R. H. Turner

VII. Taylorsville, Georgia
10. J. A. Walker
11. J. T. Williams
12. T. G. Croyton

VIII. Odenville, Alabama
13. J. H. Payne

IX. Lawtey, Florida
14. C. Dinkins

X. Southern Pines, North Carolina
15. D. G. Stutz

XI. Pembroke, Georgia
16. O. H. Smith

XII. Rutherford, Alabama
17. A. T. Walker

XIII. Meggetts, South Carolina
18. H. D. McPherson
19. C. B. Copeland

XIV. Vass, North Carolina
20. H. A. Borst

XV. Boykins, Virginia
21. C. F. Carlton

XVI. McBee, South Carolina
22. E. Meares

The parties now agree with respect to the twenty-two specific cases that the following facts are true:

I. Fairfax, South Carolina.

T. P. Barber was joint railroad-express agent at this point from and prior to October 1, 1932, to November 19, 1935. May 1, 1936, to March 31, 1937, October 1, 1937, to November 30, 1939.

W. J. Benton was such joint agent December 9, 1935 to May 2, 1936.

L. F. Johnson was such joint agent April 1, 1937 to September 30, 1937.

Since the establishment of Fairfax, as a station at which the representation of the Seaboard Air Line Railway and the Agency would be joint, to-wit, on April 4, 1932, the transfer allowance payable for transfer work for the Agency at that station was fixed by agreement between the joint agent, to-wit, T. P. Barber, and the Agency at $25.00 per month. On September 1, 1932, the said Barber wrote W. A. Stephenson, a route agent for Railway Express Agency, Inc., and the person who had charge of the office for the Agency, as follows:

"I understand thoroughly the necessity of reducing the expenses at this time on account of the depression and I am willing to help all I can. I only get $25.00 for transfer here and as you know it is worth every cent of that, but until business picks up some I am willing to handle the transfer for $20.00 per month."

That effective October 1, 1932, Stephenson acting on this letter registered Fairfax, South Carolina, as a station at which the Agency allowed incumbent agent only $20.00 per month for transfer allowance, and thereafter the Agency paid Barber, Benton and Johnson in succession this sum for that service. That if under all of the facts in this case and the applicable law, the Agency had the right to reduce the allowance from $25.00 to $20.00 as to Barber, it had the same right with respect to Benton and Johnson, and these last two during their respective incumbencies were entitled to no more than $20.00 per month transfer allowance for the reason that under this assumption Fairfax had been properly registered as a station whereat $20.00 per month was allowed by the Agency for transfer work and having been so registered the consent of the individual joint agent, when succeeding to the office, was not necessary. On the other hand, if the Agency under all of the facts of this case and the applicable law did not have the right to reduce the transfer payable at Fairfax from $25.00 to $20.00 then the amount due Barber to November 30, 1939, is $308.12, the amount due Benton covering the period of his incumbency is $30.00 and that due Johnson from April 1, 1937, to September 1, 1937 is $30.00.

II. Wattsville, Alabama.

On April 1, 1929, the Agency registered Wattsville as a station on the Seaboard Air Line at which there was

to be paid to any incumbent agent $10.00 per month as compensation for the services of the agent in transferring express matter between the main line and branch line trains at that station. This payment continued until December 15, 1935, when it was discontinued due to the fact that the Agency so arranged its operations at Wattsville that it did not any longer require the services of the joint agent in making transfer of express matter at that point during the hours of service of the joint agent. For the transfer of express matter from the night trains after the joint agent is off duty the Agency arranged with its express messengers that they should perform this work.

On August 13, 1934, W. J. Stokes wrote Newton Gibbs, then Route Agent for the Agency and as such in charge of the Agency's business at Wattsville, Alabama, said letter being as follows:

"Wattsville, Ala., Aug. 13, 1934.

Mr. Newton A. Gibbs, Route Agent,
Atlanta, Ga.

Dear Sir:

I herewith agree to handle the Railway Express Agency at Wattsville, Ala., on a strictly ten percent (10%) commission basis, without any guarantee as to the earnings of this office.

(Signed) M. J. STOKES,
Agent."

Witness:
L. D. PIERCE.

Acting upon this agreement, the express office at Wattsville was registered by Gibbs as one at which any incumbent agent was to be paid a straight commission without guarantee. Payments upon this basis were made from August 15, 1934, to January 1, 1935, on which latter date the ten dollar minimum guarantee was restored, following a letter from Stokes to Gibbs, his route agent, which was as follows:

"Wattsville, Dec. 18, 1934.

"Mr. Newton Gibbs,
Route Agent, Ry. Ex. Agency,
Atlanta, Ga.

"Dear Sir:

"Reference to our agreement temporarily for trying out express commission on 10% basis.

"This is not satisfactory with me and I request that you allow me the existing minimum of $10.00 per month—as per our agreement with Express Company—please advise.

"Yours very truly,
M. J. STOKES,
Agent."

The guarantee was restored. The Express Agency denies, however, that it was restored by force of the agreement mentioned by Stokes in his letter quoted above.

If, upon consideration of all of the facts and the applicable law in this case, it is held that M. J. Stokes is entitled to recover, then it is agreed that the amount of his recovery should be $305.00 for the wrongful deprivation of his transfer allowance and $39.54 on account of the difference between what his actual commissions were

and what he would have received had the $10.00 minimum been paid to him.

III. Gem Lake, Florida.

This is a seasonal office by which is meant that it is not opened the whole year. Originally, it was established as an express agency for the acceptance of forwarded business only. An agreement was negotiated between J. L. Williams and R. E. Davis, a route agent of the Agency, and the person in charge of the express business at Lake Gem, Florida, by the terms of which Williams agreed to handle the express business at that point on the Seaboard Air Line and act as joint railroad-express agent thereat for a straight 10% commission on all express business without minimum guarantee, both forwarded and received, the said Davis agreeing to enlarge the office so that it should become one for inbound as well as outbound express. Williams was compensated on this basis from January 1930 through January 1936.

If under all of the facts in this case and the applicable law Williams is entitled to any recovery, it is agreed that the amount of his recovery should be $325.79, being the difference between what he did actually receive as commissions from January 1930 through January 1936 and what he would have received had he been paid on a commission basis with a $10.00 per month guarantee.

IV. Apex, North Carolina.

Prior to September 1932 this point was registered by the Agency as one at which any incumbent agent would receive an allowance of $10.00 per month covering his services in making transfer of express matter between trains.

On August 29, 1932, T. F. Womble wrote to W. A. Stephenson, a route agent of the Agency and the person then having supervision of the express office at Apex, North Carolina, said letter being as follows:

"Apex, N. C. 8/29/32.

Mr. W. A. Stephenson R/A,
Raleigh, N. C.

Dear: Sir:

Our conversation with reference in express business I am willing to help all I can and while the transfer from the D & S is very heavy at times and no direct connections made here, I having to handle all the valuables and care for all the freight, I feel that I more than earn the $10.00 allowed for transfer but if the others on this line that get $10.00 for transfer will handle for $5.00 until express business picks up, I will be glad to do the same.

Yours truly,
T. F. WOMBLE,
Agent."

The said Stephenson, upon receipt of this letter, caused Apex, North Carolina, to be registered as an office at which an incumbent agent would receive as transfer allowance the sum of $5.00 per month. This point has remained so registered since that time and only $5.00 per month for this service was paid to the agent until March, 1935. It is agreed that other joint agents on the "line" who were getting "$10.00 for transfer" have, through the medium of contracts individually negotiated with them, agreed to handle the transfer for $5.00.

In January 1934 T. F. Womble wrote his route agent, then J. T. White, at Norlina, North Carolina, as follows:

"What do you think of restoring the transfer rate here to $10.00? We are handling a lot of shipments and it is costing me practically the entire $5.00 now allowed, to employ extra help to assist in making the transfer."

Acting upon this, the Railway Express Agency, effective March 1, 1935, restored the $10.00 allowance for transfer at Apex and that station was registered on March 1, 1935, as being one whereat the allowance for this transfer work would be $10.00.

It is agreed that if under all of the facts of this case and the applicable law, F. T. Womble is entitled to recover then the amount of his recovery would be $150.00, being the difference between the $5.00 and $10.00 transfer allowance at Apex for the period September 1932 to February 1935, inclusive.

V. Councils, North Carolina.

On account of the small amount of business handled at this point, the express office thereat was closed on July 1, 1931. On March 20, 1933, C. B. Holmes, being then the agent of the Seaboard Air Line Railway at this point, wrote to C. H. Sauls, Superintendent of the Seaboard Air Line Railway at Hamlet, North Carolina, as follows:

"Councils, N. C., March 20, 1933.

Mr. C. H. Sauls, Supt.,
Hamlet, N. C.

Dear Sir:

Our railroad patrons here are very anxious to get the Express office restored here, and have asked me to agree

to handle the business for a straight ten percent without establishing the ten dollar minimum. This I have agreed to do and I understand they have a petition to you to that effect.

The office was discontinued here because some of the months the business would not amount to $100.00 and would run around sixty or seventy dollars, and they claimed that the ten dollar minimum was too much outlay to justify keeping it open. However the last month the Express office here was open when Mr. Warren closed the account for the last month he paid me a commission of a little over $15.00 which shows that we did over $150.00 that month. If the Express people wish to open the office I will handle it for ten per cent and cut the $10.00 out just to be of service to our railroad patrons whom I consider to very loyal at this point.

Yours truly,
C. B. HOLMES,
Agent."

Acting upon this letter, which was transmitted to it by the said Sauls, the Railway Express Agency did on April 8, 1933, reopen the Express office at this point. It installed C. B. Holmes as the joint railroad-express agent thereat and registered the office as one at which it would pay incumbent for his service for acting as agent of the Railway Express Agency ten per cent commissions on express business handled but without any minimum guarantee. Thereafter, each month the said Holmes has been paid on that basis.

It is agreed that if under all of the facts of this case and the applicable law, C. B. Holmes is entitled to recover anything, then the amount of his recovery would be $521.99, being the difference between the commissions actually paid to the said Holmes from 1934 through No-

vember 30, 1939, and what he would have received if a $10.00 per month minimum had been in effect.

VI. Emory, Georgia.

On April 8, 1930, Superintendent R. H. May of the Agency, being the official in charge of the express office at Emory, Georgia, sent to Paul Smith, then joint railroad-express agent at this point on the Seaboard Air Line Railway, a letter to the effect that thereafter the Agency would only pay a $5.00 commission on carload movements of express. This is the letter referred to in Paragraph 8 of this stipulation. The said Smith, in response to this letter, advised his superintendent that he would not accept this as his commission. This notification from Smith to May was dated April 29, 1930, and being as follows:

"Emory Ga., April 29, 1930 E-508.

Mr. R. H. May, Supt.,
Norfolk, Va.

Dear Sir:

Re: Commissions on Car Load Shipments from and to Emory, Ga.

In reply to yours of 8th.

I am advised that in accordance with the contract between the agents of the SAL Ry. Co. and the Express Co. it will be necessary for me to take the regular commission on carload shipments, as there are no provisions being made on such shipments in the contract.

Yours truly,
PAUL SMITH,
Agent."

Thereafter, and during the remainder of 1930 and through July 1931, the said Smith paid himself, out of moneys which he received for the express company as its agent at Emory, for services in handling express carload movements an amount equal to ten per cent of the express revenue on each car handled by him. The total payment thus made to himself by the said Smith was $163.44 in excess of what his commissions would have been had he paid himself out of such funds at the rate of $5.00 per car. The Agency, during this period, entered charges on its books (called "error letters"), against the said Smith for this difference, so that on August 1, 1931, the Agency's record showed that the said Smith was indebted to it in the sum of $163.44, whereas the said Smith's records showed that he owed the Agency nothing.

On August 7, 1931, R. H. May, in his capacity as Superintendent of the Express Agency, ended the joint railroad-express representation at Emory, Georgia, and established an exclusive express office at that point, setting up the express agent at a location other than the Seaboard Air Line Railway station. Paul Smith thereupon ceased to be an agent of the Express Agency but continued as an agent of the railroad. Thereafter, on October 5, 1931, the said Paul Smith, on the stationery of the Seaboard Air Line Railway Company, wrote T. C. Watson, a route agent in charge of the Emory, Georgia office of the Agency, under R. H. May, Superintendent, as follows:

"Emory, Ga., October 5, 1931.

Mr. T. C. Watson,
Route Agent,
Elberton, Ga.

Dear Sir:

I hereby agree to accept the agency for the Railway Express Agency at Emory, Ga. I further agree to accept

it on the regular commission basis with a maximum of $5.00 per car on car load shipments. I will settle the error letters now outstanding against my former account and will settle the amount on the basis of $20.00 per month except that when commissions amount to less than $20.00 and in this event I will pay in amount of commissions.

This is agreed to with the understanding that the Express Company will allow me $60.00 per year as extra labor during school movement.

Yours very truly,
PAUL SMITH,
Agent."

Acting upon this letter, the said Watson reestablished the joint railroad-express agency at Emory, Georgia, and the said Paul Smith was checked in as agent at that point for the express company. Thereafter the said Smith carried out the undertaking stated in his letter of October 5th, above quoted, and repaid the entire $163.44 to the Agency and the Agency did allow said Smith $60.00 for extra labor during school movement. From and after his reestablishment as joint railroad-express agent at Emory, he has, in making up his accounts with the Express Agency, deducted only $5.00 per car as his commission for handling of express carload shipments.

In 1930 the express office at Emory, Georgia, was registered by the Agency as one at which the commissions allowed to an incumbent agent on carload business would be $5.00 per car.

Paul Smith served as express agent at Emory, Georgia, until sometime in April 1934. He was succeeded by R. H. Turner. On April 19, 1934, during the incumbency of R. H. Turner, a carload of horses moved from Emory, Geor-

gia, by express. In stating his accounts to the Express Agency, said Turner allowed himself a commission of $5.00 for handling this shipment. On January 14, 1935, another carload of horses moved by express from Emory, Georgia, and the said Turner again allowed himself a commission of $5.00 for handling the same.

Thereafter, and on May 8, 1935, the said Turner signed an audit in which, over his signature, he stated:

"I understand that the rate of commission is ten per cent on all SAL Express charges and $5.00 maximum on carloads."

It is agreed that if under all of the facts of this case and the applicable law Paul Smith is entitled to any recovery, the amount of his recovery would be $445.99, being the difference between commissions earned on carload business at the rate of 10% upon carload movements of express and a rate of $5.00 per car, from April 1930 through April 1934.

It is agreed that if under all of the facts of this case and the applicable law R. H. Turner is entitled to recover, the amount of his recovery would be $168.80, being the difference between commissions earned on carload business at the rate of 10% upon carload movements of express and a rate of $5.00 per car, between April 1934 and June 1935.

VII. Taylorsville, Georgia.

J. A. Walker served as joint railroad-express agent at this station on the Seaboard Air Line from and before January 1, 1934, to June 1936; J. T. Williams was such agent from August 1936 to and including July 1937; T. G.

Crayton was such agent from August 1937 to January 1938.

Prior to 1934 the office at Taylorsville was registered by the Agency as one at which any express agent would be paid a commission of 10% for his services to the Agency with a minimum of $10.00 per month. In 1934 Newton Gibbs, a route agent for the express company and in charge of the express office at Taylorsville, contemplated closing and discontinuing (with the consent of the proper state authority) the express agency at that point. He advised J. A. Walker, then the incumbent agent, of his purpose and he stated to Walker as the reason for this that the express revenue at Taylorsville was not sufficient to justify the continuance of the office if the Agency paid $10.00 per month as a guarantee to the agent. Walker stated to Gibbs that while he thought he should have a minimum guarantee he would, rather than have the office closed, act as express agent on a straight 10% commission without any guarantee. Thereupon Gibbs caused Taylorsville to be registered by the Agency as a station at which any incumbent agent would receive commissions only, without a minimum guarantee. It has been so registered since that time. If it be assumed under all of the facts in this case and the applicable law that the office was legally and properly registered as one at which no guarantee existed, those who became express agents thereat after such registry would be entitled to receive only such compensation as was fixed in the registration. On the other hand if it be assumed that under the facts and circumstances of this case and the applicable law the registry thereof as a straight commission office was void and of no effect and the proper registry should have been one which showed that a $10.00 guarantee existed at Taylorsville, then Williams and Crayton under such circumstances would have been entitled, when serving as express agents, to the minimum guarantee.

It is agreed that if under all of the facts and circumstances of this case these three men are entitled to recover, the amount of their respective recoveries would be:

J. A. Walker	$138.75
J. T. Williams	88.59
T. G. Crayton	43.27

VIII. Odenville, Alabama.

This office was closed by appropriate order of the Alabama Public Service Commission on March 3, 1934. On March 13th J. H. Payne, former joint railroad-express agent at that point and then agent solely for the Seaboard Air Line Railway, wrote to W. M. Smith, then superintendent of the Agency and in charge of the express office at Odenville. The letter is as follows:

"With further reference to my letters of March 3rd and 10th, in connection with the opening of an express office at Odenville, Ala.

If it is decided to open this office, I hereby agree to act as agent and handle the same, on a strictly 10% basis, without regard to any stipulated minimum guarantee as to the amount earned."

Thereupon, acting upon the letter the express office was re-opened the next day, March 14, 1934. Upon its re-opening the station was registered by the Express Agency as one at which no guarantee as to commissions existed. Payments to said J. H. Payne from that time through November, 1939, have been on a straight commission basis without minimum.

It is agreed that if under all of the facts of this case and the applicable law J. H. Payne is entitled to recover,

the amount of his recovery would properly be $489.61, being the difference between the Commissions actually paid him by the Agency from March 1934 through November 1939 and what he would have received had a $10.00 minimum guarantee been applied.

IX. Lawtey, Florida.

Under the provisions of the contract between the Southern Express Company and the Seaboard Air Line Railway Company, providing for the conduct of the express business on that railroad by the Southern Express Company, the Express Company did not conduct the transportation of carload shipments of perishables in refrigerator cars; the railroad company having specifically reserved to itself the right to handle that business.

When the American Railway Express Company commenced express operations on July 1, 1918, the same condition continued. When the Uniform Contract for Express Operations between the American Railway Express Company and the Seaboard Air Line Railway Company became effective, September 1, 1920, the railroad company specifically excluded the handling of perishable commodities in carloads in refrigerator cars from express service, and continued that exclusion during the period of Amended Uniform Contract, which became effective March 1, 1923. The Seaboard Air Line Railway Company made the same restriction and reservation in the Standard Operations Agreement with the Railway Express Agency, which agreement became effective March 1, 1929.

For many years the shippers in Florida and the Railroad Commission of that State, had endeavored to secure passenger train transportation for carload shipments of

strawberries in refrigerator cars, and, in 1929, following extensive and prolonged hearings, the Interstate Commerce Commission issued an order directing the Seaboard Air Line Railway Company, and other railroad companies, to provide on or before December 1, 1929, and thereafter to furnish refrigerator cars for the movement of strawberries from Florida to Eastern and Northern markets on schedules which would provide service equivalent to passenger train transportation; *(Transportation of Strawberries by Express, etc.*, 156 I. C. C. 4).

The time intervening between the date of the service of the order and the beginning of the strawberry movement, was insufficient to enable the railroad companies themselves to provide passenger train equipment, and to make all the necessary arrangements for the movement, including interchange with connecting lines, and, shortly prior to the commencement of the season, the Seaboard Air Line Railway Company requested the Railway Express Agency to take over the handling of the traffic during the 1929-1930 season, with a specific agreement that the arrangement was to expire on June 30, 1930, thereby waiving the provision of the Standard Operations Agreement to the extent that the Agency might conduct the business during the 1929-1930 season. The tariffs of the Express Agency, covering the service, provided that the rates and services expired June 30, 1930 (Railway Express Agency Tariff I. C. C. No. 132).

With the beginning of the season 1930-1931, the Seaboard Air Line Railway Company decided that as a result of the experiment for the season 1929-1930, it would renew the arrangement for another year, and that was made effective and covered by tariff issued by the Railway Express Agency (Railway Express Agency Tariff I. C. C. No. 227), which expired June 30, 1931. The same

situation was renewed for the season 1931-1932, and tariff was issued by the Railway Express Agency and filed as Railway Express Agency Tariff I. C. C. No. 299, to expire June 30, 1932, and, for subsequent seasons, the Seaboard Air Line Railway Company has permitted the special contract to rem. n in effect.

Sometime during the week of November 18th, or in the early part of the next week, in the year 1929, A. B. Scruggs, then a superintendent of the Agency, with headquarters at Jacksonville, Florida, and R. E. Davis, then a route agent under the said Scruggs, together went to Lawtey, Florida. These two men had supervision over the express office and express business at Lawtey. The purpose of their visit was to make arrangements for the handling of strawberries to be moved in express service out of Lawtey in carload shipments under refrigeration for the 1929-1930 season. Lawtey and Starke are the two principal shipping points for strawberries which are grown in this section of Florida. Some of the berries are shipped from Starke, some from Lawtey. The Agency then maintained at Starke an exclusive salaried agent, that is to say, its agent at that point was paid a straight salary regardless of the amount of business done. On the other hand, the agent at Lawtey, whose name was C. Dinkins, was a joint agent with the Seaboard Air Line Railway, which line of railroad was the only one serving Lawtey. This joint agent's compensation from the Express Agency for handling express business at Lawtey was on a commission basis. Prior to this time, on the occasional carload shipments which moved by express, joint railroad-express agents on this line of railroad, whose compensation was on a commission basis, were allowed a certain percentage of the express revenue received on car-lot movements which the Agency was permitted to handle under its operating agreement with the railroad

(which did not include carload perishable shipments under refrigeration). The scale of commissions so allowed was the same as that stated in Article 2 of the agreement between the joint agents and the Southern Express Company, dated August 1, 1917 (see Paragraph 1 of this stipulation). No car-lot shipment, either of strawberries or any other commodity, has ever moved out of Lawtey by express prior to December 1, 1929. The express company itself receives only 15% out of the total express charge for car-lot shipment. The balance, of 85%, goes to the railroad. To illustrate:

If we suppose $100.00 to represent the total express charges which are paid for the transportation of a carload of strawberries, the Express Company immediately allocates $85.00 to the Railroad as its part thereof. Next, the agent's commissions are fixed. If the allowance to the agent is upon a percentage basis, the percentage is calculated upon the total charge, that is, upon $100.00. Assuming that the commission is 10%, the amount of $10.00 is deducted from the remaining $15.00 in the hands of the Express Company. $5.00 thus remains to the Express Company, which goes into its general revenue and is lumped with other express receipts, and becomes part of the gross transportation revenues which are handled in accordance with Article V of the Express Operations Agreement, being Exhibit No. 16 hereof.

All of these things were brought to the attention of said Dinkins by Scruggs and Davis on the occasion of their visit to Lawtey in November, 1929, and Dinkins then was told that, in view of this business, new to the express company, the Railway Express Agency would establish at Lawtey an exclusive agent and compensate him upon a salary basis. Dinkins was advised, however, that if he would agree to handle carload shipments of strawberries

out of Lawtey for a compensation to him of $5.00 per car, the Express Agency would be willing to pay him that amount and he could handle the business.

Scruggs and Davis returned to Jacksonville and Scruggs reported to higher officials of the express company the result of the interview with Dinkins. In response to this report Scruggs was instructed by his superior in the company organization to obtain a written statement from Dinkins in line with the agreement previously reached. Acting upon instructions from Scruggs, Davis returned to Lawtey for the purpose of procuring such a statement. On November 29, 1929, Dinkins delivered to Davis a letter reading as follows:

"Lawtey, Florida, November 29, 1929.

"Commission on Car Lot Movement by Express.

Mr. A. B. Scruggs, Supt.,
Jacksonville, Fla.

Dear Sir:

"The position of the Express Company on the matter of commissions on car lot shipments was outlined to me today and I am agreeable to accepting $5.00 per car on such shipments.

"It is my understanding that the practice will be general on the Seaboard Air Line.

"Yours truly,
C. DINKINS,
Agent."

On December 20, 1929, by United States mail, Superintendent Scruggs notified all agents at points in Florida known as strawberry-shipping points, which includes all

joint agents on the Seaboard Air Line Railway, that a commission of $5.00 a car would be allowed as compensation on each carload shipment forwarded from such agent's office. This notice was sent to C. Dinkins, Agent at Lawtey, Florida, and, on January 6, 1930, Dinkins acknowledged receipt of the notice of December 20, 1929, "relative to commission on refrigerator cars." Usually a commission agent, if the income of the office is sufficiently large, pays himself his commissions out of moneys received for the Express Company. There are some instances, however, in which the amounts received are not sufficient to permit indulgence in this practice. In instances of this kind, it is the rule of the Agency for the agent to make a statement, on forms provided, of the amount of compensation due him each month and to forward this to his supervising route agent, who, in turn, arranges for a check to be issued to such joint agent. This was the situation existing at Lawtey after the Express Agency began the handling of refrigerated car-lot movements of strawberries at that point. For the first month after the strawberries began to move in 1930, Davis, the route agent, assisted Agent Dinkins in preparing his statement showing the amount due him for his services to the Express Agency. These statements were worked out to show that Dinkins was to receive $5.00 on each car of strawberries moving out of Lawtey. As soon as Dinkins became familiar with the method of stating his accounts to the Express Agency, he, each month, filled them out himself, and, beginning in the 1930 season and continuing until the time of his retirement in 1938, Dinkins, each month of the season during which strawberries moved, presented his account to the Express Agency and worked out his compensation on a basis of $5.00 per car.

It is agreed that if, under all of the facts in this case and the applicable law, C. Dinkins is entitled to recover,

the amount of his recovery would be $25,690.49 principal and interest in the amount of $10,556.88, being interest at the rate of 6% on unpaid yearly balances from July 1 of each year calculated to December 31, 1939.

X. Southern Pines, North Carolina.

D. G. Stutz was joint railroad-express agent on the lines of the Seaboard Air Line at Southern Pines, North Carolina, in 1930 and for some years prior thereto. He received the letter which R. H. May, a superintendent of the Agency with jurisdiction over the express office at Southern Pines, wrote every such joint agent under his, May's, jurisdiction on this line and in which letter the joint agent was advised that thereafter the Express Agency would pay its commission agents commissions of $5.00 on carload movements by express. This is the letter referred to in Paragraph 8 of this stipulation. Stutz ignored this letter and continued, in rendering his accounts to Railway Express Agency, to pay himself commissions of 9% of the express charges on all express shipments handled at Southern Pines. The Railway Express Agency continued to charge to Stutz on its books ("error letters") the difference between the commissions on this carload business which Stutz was taking and Commissions at the rate of $5.00 per car which the Express Agency claimed was the proper amount which this agent should take. This state of affairs continued from April, 1930, until August, 1931, at which time Stutz wrote R. H. May as follows:

"Our conversation of yesterday.

"I will accept the maximum commission of $5.00 per car on carload express shipments with the understanding that the Express Agency will pay me more than

the $5.00 commission on business of the kind mentioned in the event the Express Agency pays any other joint commission agent a greater rate of commission on such business. In the latter event I will expect the Express Agency to pay me the same rate of commission that other joint commission Agents will be paid."

The Express Agency has not paid any other joint commission agent a greater rate on car-lot business than $5.00 per car on the lines of the Seaboard Air Line Railway since August 4, 1931.

From and after August of 1931, Stutz has, in rendering his accounts to the Express Agency, deducted $5.00 only as his commission on carload express shipments. The Railway Express Agency, as part of the agreement reached with Stutz respecting the rate that he was to have for handling carload business at Southern Pines, allowed him to retain and keep the commissions which he paid himself at the rate of 9% on carload business from April 1930 to August 4, 1931.

It is agreed that if under all of the facts of this case and the applicable law D. G. Stutz is entitled to recover anything, the amount of his recovery would be $539.14, if calculated upon the difference between the commissions taken by him at the rate of $5.00 per car and commissions at the rate of 9% on all carload express business handled by him out of Southern Pines between August 1931 and April 1938. If the rate of commissions used in the above calculation is 7%, which would be the rate that said Stutz would be entitled to receive if the formula set out in Article 2 of the Southern Express Company agreement of August 1, 1917, had been followed, then during the period between August 1931 and April 1938 the commissions paid such Stutz at the rate of $5.00 per car

would have exceeded by $369.08 the amount to which he would have been entitled.

XI. Pembroke, Georgia.

C. H. Smith was joint railroad-express agent at Pembroke, Georgia, in 1930 and he duly received the letter dated March 25, 1930, written to him and other joint railroad-express agents on the lines of the Seaboard Air Line Railway by A. B. Scruggs, former Superintendent. This is the letter referred to in Paragraph 8 of this stipulation.

On November 6, 1934, C. H. Smith was checked out as joint railroad-express agent at Pembroke and O. H. Smith was checked in as such agent by M. Marshall, a route agent for Railway Express Agency with jurisdiction over the Pembroke, Georgia express office. O. H. Smith as incoming Agent signed a statement at the time of becoming agent for the Railway Express Agency, said statement being as follows:

"I understand that the rate of commission allowed at this Agency is 10% on all LCL Express charges, maximum carload $5.00."

In making his reports and accounting to the Agency for money handled by him as Express Agent at Pembroke, Smith paid himself commissions on all carload express shipments at the rate of $5.00 per car.

It is agreed that if under all of the facts of this case and the applicable law O. H. Smith is entitled to recover, then the amount of his recovery would be $161.30, being the difference between the allowance of $5.00 per car on express carload movements handled by him in 1938 and commissions at the rate of 7% of the express charges on such cars.

XII. Rutherford, Alabama.

The office at Rutherford, Alabama, was closed under the authority of the Alabama Public Service Commission June 28, 1933. On August 23, 1933, A. T. Walker, who had formerly been joint railroad-express agent at this point on the Seaboard Air Line Railway and who was then agent for the railroad only, wrote to H. Marshall, a route agent for the Railway Express Agency and in charge of the express office at Rutherford. Said letter being as follows:

"Yours received in regards to me handling Express on a straight 10% basis, account of the Express patrons having so much trouble getting Express from Huntsboro they asked me to handle it for them and I told them that only objections I had of handling the Express was that #11 run late lots in Winter and I most always had a perishable shipment for it when it was late and I had to stay here.

If the Express is willing to re-establish the agency here I will take it on a straight 10% basis and meet #11 if it is not unreasonable late.

I have a patron here who has been having his shipments shipped to Hurtsboro every Saturday, I am instructing him that he can get it here so you can instruct messenger not to put it off at Hurtsboro."

Acting on this letter, the express office at Rutherford was reopened and said Walker was installed as agent of the Railway Express Agency thereat and the said Marshall caused the Rutherford office to be registered as one at which any incumbent agent would receive commissions of 10% of all express charges, but without a minimum

guarantee. Before it was closed, the office had been one in which a minimum guarantee of $10.00 in commissions existed.

It is agreed that if under all of the facts of this case and the applicable law A. T. Walker is entitled to recover, then the amount of his recovery would be $451.50, being the difference between the amount paid to him by the Agency from October 1933 through July 1939 on a straight 10% commission basis and the amount which would have been paid to him during that period if a $10.00 minimum per month had been applied.

XIII. Meggetts, South Carolina.

D. H. McPherson was joint railroad-express agent at this point on the line of the Seaboard Air Line Railway from March 1935 to May 13, 1935, and from June 13 through November 1935. C. B. Copeland was such agent from May 14, 1935, to June 12, 1935. Meggetts is a seasonal office, which is to say that it is operated as an express office only during certain months of the year. The Express Agency has registered Meggetts as an office at which it will pay to its agent thereat a certain percentage of express revenues at that point as a commission. As so registered, the percentage to be paid any incumbent agent as commission would vary according to the amount of business done per month during the previous year. The scale at which the office at Meggetts was registered is the same as that which is set forth in Article 2 of the Southern Express Company contract of August 1, 1917, referred to in Paragraph 1 of this stipulation.

The Agency paid McPherson commissions at the rate of 9% on express business handled by him. This was upon the assumption that the previous year's business

exceeded $50.00 per month in commissions but did not exceed $75.00 per month. Copeland was compensated on the same basis. In determining whether the rate should be 10% or 9%, the Agency divided the total commissions earned at the station by the number of months the station remained open. This, in fact, gave a figure of per month commissions in excess of $50.00 but not greater than $75.00, which would result in a commission of 9% for the ensuing year. If, as the agents claim, the previous year's per month commissions at Meggetts should have been determined by dividing the total amount by twelve, then the resultant figure would have entitled the agents to a commission of 10%. It is agreed that the question here presented is whether in determining the base for fixing the agents commissions, the total commissions for the previous year should be divided by the number of months during which the express office remained open and transacted business in order to get at a per month commission for the previous year, or whether the total amount of commissions earned should be divided by twelve, being the number of months in a full calendar year, in order to get at the per month commissions on the "previous year's business".

It is agreed that if H. D. McPherson and C. B. Copeland, under all of the facts of this case and the applicable law, are entitled to recover, then the amount of their recovery would be:

H. D. McPherson	$ 61.64
C. B. Copeland	$105.47

XIV. Vass, North Carolina.

H. A. Borst was joint railroad-express agent at Vass, North Carolina, in 1930. He received the letter of April

8, 1930, written by R. H. May, superintendent of the agency, to all such agents on the Seaboard Air Line under the jurisdiction of the said May. This letter is that referred to in this stipulation in Paragraph 8 hereof. Said Borst acknowledged the receipt of said letter in one which he wrote to Superintendent R. H. May at Norfolk, Virginia, under date of April 17, 1930, being as follows:

"Yours 4-8 File E. 503. I acknowledge receipt of same.

Yours truly,

H. A. BORST."

Acting on this letter, Borst in making reports and rendering his accounts as agent for the express company at Vass, North Carolina, for the years subsequent to 1930 paid himself $5.00 per car as commissions on all carload express business moving from that station.

It is agreed that if under all the facts in this case and the applicable law H. A. Borst is entitled to recover, the amount of his recovery would properly be $1513.23, being the difference between the amount received at the rate of $5.00 per car and the sum which he would have received had he been paid a commission of 10% of the express charges on such cars.

XV. Boykins, Virginia.

C. F. Carlton was joint railroad-express agent at this point on the Seaboard Air Line Railway in 1922 and prior thereto. Before March 1, 1922, Boykins had been registered by the Agency as a point at which there was allowed any incumbent agent the sum of $25.00 for transferring express matter between trains at that station. Beginning on March 1, 1922, this registration was changed to show that this allowance would be only $20.00 per month. This

smaller amount was paid Carlton for that service from that date through August, 1932. On August 30th and again on August 31st, 1932, Carlton wrote to W. R. Poyner, the route agent of the Agency in charge of the Boykins office, letters which are as follows:

"Boykins, Va., Aug.-30-32.

W. R. Poyner R/A.

Our conversation. I hereby agree to accept salary of ten dollars ($10.00) per for handling transfer business at this station effective Sept. 1st, 1932 with the understanding that when business gets back normal that my old salary will be re-established.

C. F. CARLTON,
Agt."

"Boykins, Va., Aug.-31-32.

Mr. W. R. Poyner R/A,
Norfolk, Va.

Dear Sir:

Guess my wire surprised you. After thinking this over during night, there are some facts that you "nor" myself discussed or considered, viz. the winter season and lateness of trains that very often keep me on duty as late as 7:00 P. M. to 11:00 P. M. So far as the actual work is concerned I agree that it does not amount to much. The responsibility of transfer money and lateness of train are the greatest items to be considered and I feel sure that after thinking this over you and Mr. May both will agree that a 25% cut would be fair and reasonable to both of us. This was all you wanted to cut some time back. If trains were never late and I did not have to work 30 mins. over time each day it would not be so bad. But

when trains are on time I am kept here 30 mins. after closing hour every day and when trains are late it works a hardship on me and is quite an inconvenience. Kindly handle this with May. I am perfectly willing to do anything that is reasonable and right and I do really feel that a 25% cut would be reasonable to both parties.

Yours very truly,
C. F. CARLTON."

Thereupon, and effective September 1, 1932, Poyner caused the office at Boykin to be registered as one at which the transfer allowance to any incumbent agent was $15.00 monthly. That amount has been paid to and received by Carlton since that time.

It is agreed that if C. F. Carlton is under all of the facts of this case and the applicable law entitled to recover, the amount of his recovery would properly be $1235.00, being the difference between the amount of Allowances paid him since March 1, 1922, and what he would have received had he been paid at the rate of $25.00 per month.

XVI. McBee, South Carolina.

E. Meares was joint railroad-express agent at McBee, South Carolina, a station on the Seaboard Air Line Railway. On June 16, 1930, Meares wrote to E. S. Harrison, a route agent of the Agency and the person in charge of the express office at McBee a letter, copy of which is as follows:

"McBee, S. C., June 16, 1930.

Mr. E. S. Harrison, RA,
Hamlet, N. C.

Dear Sir:

Referring to our conversation this A. M. relative to previous handling on separation of express agency at this point.

Beg to say that I will go ahead on the commission on carload shipments of $5.00 per car and that I am not handling the matter further with the committee which represents us as agents over the Seaboard Sys., will state that I did in Apl. send our General Chairman advice as to the instructions from Supt. May, in regards to the $5. commission on car load lots, however, I do not know whether he ever handled the matter or not and I do not know whether he intends to handle the matter. I give the Genl. Chm. advice regarding the above as it was one of my duties as Local Chairman for this Divn. of Agent to keep the Genl. Chm. posted of anything that concerned us as Agents over the Seaboard.

I hope this explanation will be satisfactory to all concerned.

Yours very truly,
E. MEARES,
Agent."

Thereafter, in making his reports and accounting in respect of his representation of the Agency as its agent at McBee, Meares paid himself by deduction from moneys in his hands belonging to the Agency, at the rate of $5.00 per car for all carload express shipments moving out of McBee.

If under all of facts in this case and the applicable law E. Meares is entitled to recover, the amount of his recovery would be $330.22, being the difference between the $5.00 commissions received and what he would have received if he had been paid 10% of the total express revenue on each carload for handling the same.

14. It is agreed that either party hereto may introduce evidence not in conflict with the facts stipulated herein, relative to the issue as to whether or not the

relation of employer-employee exists, or has ever existed, between the Agency and the joint railroad-express agents on the Seaboard Air Line Railway under the terms of the Railway Labor Act as amended in 1934, and also upon the issue as to whether or not there was a pending and unadjusted dispute between the Agency and the joint railroad-express agents on the Seaboard Air Line Railway on June 21, 1934 (the date upon which the Railway Labor Act as amended was approved by the President), growing out of grievances or out of the interpretation or application of an agreement concerning rates of pay, rules or working conditions.

As one of the issues in this case is whether, under all of the facts, a joint railroad-express agent had or has a right to make an individual agreement or contract with the Agency relative to any matter covered by the provisions of the Agreement attached to the petition herein, marked Exhibit "B", nothing in this Stipulation of Facts shall be construed as an admission on the part of the Plaintiff that any joint railroad-express agent, either for himself or for a successor joint railroad-express agent, had or has a right to make an individual contract with the Agency, the terms of which are in conflict with the terms and provisions of said Exhibit "B"; nor as an admission on the part of defendant that such right does not exist.

(Signed) WM. G. McRAE,
Attorney for Order of Railroad Telegraphers.

(Signed) BLAIR FOSTER,
Attorney for Railway Express Agency, Incorporated.

81 "EXHIBIT No. 1".

Exhibits Referred to in Stipulation.

The Order of Railroad Telegraphers,

E. J. Manion, President.

3673 West Pine Boulevard,

St. Louis, Mo.

October 7, 1935.

761-90-SAL.

Mr. H. A. Johnson, Secretary,
N. R. A. B., Division No. 3,
1804 Consumers Building,
Chicago, Illinois.

Dear Sir:

I am enclosing herewith, in fifteen copies, advance notice upon the part of Mr. R. F. Thompson, General Chairman of The Order of Railroad Telegraphers on the Seaboard Air Line Railway, of his intention to file with your Board in ex parte, a dispute existing between his Committee and the Railway Express Agency, Incorporated, which has failed of adjudication in correspondence between the parties thereto, and which embraces the following claim:

"Claim of the General Committee of The Order of Railroad Telegraphers, on Seaboard Air Line Railway, that:

(1) The commission rate on carload express shipments accruing to the joint railway-express agent at Lawtey, Florida, as established by Article 2 of the Express Agreement of August 1, 1917, and at all other joint agencies on Seaboard Air Line handling carload express shipments, shall be restored as of the date the rate was arbitrarily reduced.

(2) That the minimum amount of commission of ten dollars ($10.00) per month, as established and guaranteed by Article 2 of the Express Agreement of August 1, 1917, shall be restored to the joint railway-express agency at Rutherford, Alabama, and at all other joint railway-express agencies where the minimum rate has been arbitrarily reduced or reduced through individual agreement between the express company and agent, and that these agents be retroactively reimbursed in the amount of the difference that should have been paid under the express agreement.

(3) That all transfer allowances established by Article 3 of the Express Agreement of August 1, 1917, and higher rates in effect which have been arbitrarily changed, or changed by individual agreement, as at Moncure, North Carolina, shall be restored retroactively to the date such changes were made in violation of the Express Agreement, and all agents affected be paid the difference due them under the Express Agreement."

This advance notice is given you in accordance with the rules of procedure promulgated by the Board, and indicates that a copy has been furnished the highest officer of the Railway Express Agency, Incorporated, designated to handle such controversies.

Yours respectfully,
E. J. MANION.

2-5

cc—Mr. R. F. Thompson,
General Chairman, S. A. L.,
Rochelle,
Georgia.

82 "EXHIBIT No. 1."

The Order of Railroad Telegraphers.

Seaboard Air Line Railway.

System Division No. 28.

Rochelle, Georgia, October 8, 1935.

Mr. H. A. Johnson, Secretary,
N. R. A. B., Division No. 3,
1804 Consumers Building,
Chicago, Illinois.

Dear Sir:

This is to advise that it is the intention of the undersigned to file with your Board on or before November 9th, 1935, in ex parte, an unadjusted dispute between the General Committee of The Order of Railroad Telegraphers, on the Seaboard Air Line Railway, and the Railway Express Agency, Incorporated, involving the following subject:

"Claim of the General Committee of The Order of Railroad Telegraphers on Seaboard Air Line Railway that:

(1) The commission rate on carload express shipments accruing to the joint railway-express agent at Lawtey, Florida, as established by Article 2 of the Express Agreement of August 1, 1917, and at all other joint agencies on Seaboard Air Line handling carload express shipments, shall be restored as of the date the rate was arbitrarily reduced.

(2) That the minimum amount of commission of ten dollars ($10.00) per month, as established and guaranteed by Article 2 of the Express Agreement of August 1, 1917, shall be restored to the joint railway-express agency at Rutherford, Alabama, and at all other joint railway-ex-

press agencies where the minimum rate has been arbitrarily reduced or reduced through individual agreement between the express company and agent, and that these agents be retroactively reimbursed in the amount of the difference that should have been paid under the express agrement.

(3) That all transfer allowances established by Article 3 of the Express Agreement of August 1, 1917, and higher rates in effect which have been arbitrarily changed, or changed by individual agreement, as at Moncure, North Carolina, shall be restored retroactively to the date such changes were made in violation of the Express Agreement, and all agents affected be paid the difference due them under the Express Agreement."

This dispute has been handled with the Railway Express Agency, Incorporated, which declines to become a party to the controversy.

Mr. L. R. Gwyn, Chairman, Committee on Wages and Working Conditions, Railway Express Agency, Incorporated, was invited to join in submitting this dispute to your Board, but declined to do so.

Yours respectfully,

R. F. THOMPSON,
General Chairman,
Seaboard Air Line,
System Division No. 28.

2-5

cc—Mr. L. R. Gwyn, Chairman,
Committee on Wages & Working Conditions,
Railway Express Agency, Incorporated,
230 Park Avenue,
New York City,
New York.

84 "EXHIBIT No. 2."

The Order of Railroad Telegraphers,

E. J. Manion, President.

3673 West Pine Boulevard,

St. Louis, Mo.

November 7, 1935.

761-90-Ry. Exp. Agy. Inc. (S. A. L.).

Mr. H. A. Johnson, Secretary,
N. R. A. B., Division No. 3,
1804 Consumers Building,
Chicago, Illinois.

Dear Sir:

I am sending you under separate cover, fifteen copies of an appeal to your Board, filed by Mr. R. F. Thompson, General Chairman of The Order of Railroad Telegraphers of the Seaboard Air Line Railway, covering an unadjusted dispute existing between this Committee and the Railway Express Agency, Incorporated, a successor to the Southern Express Company and the American Express Company. The dispute is embraced in the following claim:

"(1) The commission rate on carload express shipments accruing to the joint railway-express agent at Lawtey, Florida, as established by Article 2 of the Exp ess Agreement of August 1, 1917, and at all other joint agencies on Seaboard Air Line handling carload express shipments, shall be restored as of the date the rate was arbitrarily reduced.

(2) That the minimum amount of commission of ten dollars ($10) per month, as established and guaranteed by Article 2 of the Express Agreement of August 1, 1917, shall be restored to the joint railway-express agency at Rutherford, Alabama, and at all other joint railway-express agencies where the minimum rate has been arbitrarily reduced or reduced through individual agreement between the express company and agent; and that these agents be retroactively reimbursed in the amount of the difference that should have been paid under the express agreement.

(3) That all transfer allowances established by Article 3 of the Express Agreement of August 1, 1917, and higher rates in effect which have been arbitrarily changed, or changed by individual agreement, as at Moncure, North Carolina, shall be restored retroactively to the date such changes were made in violation of the Express Agreement, and all agents affected be paid the difference due them under the Express Agreement."

The General Committee of The Order of Railroad Telegraphers, upon behalf of the station agents and telegraph employees of the Seaboard Air Line Railway, who also act as joint employees of the Railway Express Agency, Incorporated, has been unable to present to the defendant Railway Express Agency, Incorporated, all of the data submitted in this appeal for the reason that the Chief Operating Officers of said Railway Express Agency, Incorporated, designated to handle disputes between the company and its employees, has declined to confer with our Committee. The dispute is respectfully referred to your Board with my approval, for its review and decision.

Yours truly,

(Signed) E. J. MANION.

2-5

cc—Mr. R. F. Thompson,
Gen'l Chairman, S. A. L.,
Rochelle, Georgia.

86 "EXHIBIT No. 3."

Parties to the Dispute:

The Order of Railroad Telegraphers
versus
Railway Express Agency, Incorporated.

Ex Parte Submission.

Statement of Claim:

Claim of the General Committee of The Order of Railroad Telegraphers on Seaboard Air Line Railway, that:

(1) The commission rate on carload express shipments accruing to the joint railway-express agent at Lawtey, Fla., as established by Article 2 of the Express Agreement of August 1, 1917, and at all other joint agencies on Seaboard Air Line handling carload express shipments, shall be restored as of the date the rate was arbitrarily reduced.

(2) That the minimum amount of commission of ten dollars ($10.00) per month, as established and guaranteed by Article 2 of the Express Agreement of August 1, 1917, shall be restored to the joint railway-express agency at Rutherford, Ala., and at all other joint railway-express agencies where the minimum rate has been arbitrarily reduced or reduced through individual agreement between the express company and agent; and that these agents be retroactively reimbursed in the amount of the difference that should have been paid under the express agreement.

(3) That all transfer allowances established by Article 3 of the Express Agreement of August 1, 1917, and higher

rates in effect which have been arbitrarily changed, or changed by individual agreement, as at Moncure, N. C., shall be restored retroactively to the date such changes were made in violation of the Express Agreement, and all agents affected be paid the difference due them under the Express Agreement.

Ex Parte Statement of Facts:

An Express Agreement, revised as of August 1, 1917, was duly executed between the Southern Express Company and the General Committee of The Order of Railroad Telegraphers in behalf of the joint railway-express agents on Seaboard Air Line Railway. The agreement governed the rules and rates of commission and transfer allowances for the joint agents on the Seaboard Air Line Railway, and was in effect when the Southern Express Company was succeeded by the American Railway Express Company and later by the Railway Express Agency, Inc., which companies assumed all contracts of their predecessors.

Beginning in the year 1930, the Railway Express Agency, Inc., arbitrarily, or through individual agreement with the joint agent, arbitrarily reduced the commission and transfer allowance at numerous agencies in violation of Articles 2, 3 and 14 of the Express Agreement, and arbitrarily established a flat commission rate on carload shipments by express of $5.00 per car in violation of these articles.

The Railway Express Agency, Inc., the agent for the railway in the express transportation business on its lines, declines to confer with the Committee on these matters and declines to make adjustment of the violations of the express agreement.

The Express Company has declined to join with the Committee in submitting this dispute to the Adjustment Board.

Position of Committee:

Effective July 1, 1909, a signed agreement was executed between the Southern Express Company and the General Committee of The Order of Railroad Telegraphers on Seaboard Air Line Railway, governing rules, rates of commission and transfer allowance for agents in the employ of the Seaboard Air Line Railway who are required by the railway to also serve the express company as agent, or perform transfer service, at railroad stations. This agreement was revised as of June 1, 1912, and again on August 1, 1917, and was in full force and effect when the United States Railroad Administration assumed control and operation of transportation by railroad.

On June 26, 1918, the United States Government, through the Director General of Railroads, negotiated a Memorandum of Agreement with the four principal express companies operating at that time (the Adams, American, Wells-Fargo, and Southern) through the medium of a newly organized joint operating company, titled the "American Railway Express Company", which company, under the terms of the Memorandum of Agreement, was the sole agent of the Government under the supervision of the Director General of Railroads to conduct the express transportation business upon all lines of railroad under Federal control and upon such other systems of transportation or parts thereof as in the judgment of the Director General it became necessary or desirable to include. This possession and control of the express business by the Director General was later confirmed by proclama-

tion of the President of the United States as of November 18, 1918.

The American Railway Express Company—the joint operating company for the Adams, American, Wells-Fargo, and Southern Express Companies—was maintained after the termination of Federal control, and on September 1, 1920, at the end of the Guarantee Clause (Sec. 209) of the Transportation Act, 1920, a "Uniform Contract for Express Operations over Rail Lines" was prepared and executed between the American Railway Express Company and Rail Companies in the United States, including the Seaboard Air Line Railway, whereby the Express Company was granted the exclusive right and privilege to control, conduct and transact all of the express transportation business over its lines.

Thus, the joint operating company—the American Railway Express Company—operated the express transportation business on the Seaboard Air Line Railway for the Southern Express Company, and took over and assumed the obligations and contracts of the Southern Express Company, and continued to do so until succeeded by the Railway Express Agency, Inc., at which time it was operating under a contract with the Rail Companies amended as of March 1, 1923.

As of March 1, 1929, the Rail Companies in the United States united in acquiring the American Railway Express Company through their own express agency, thereafter known as the Railway Express Agency, Inc., and have since conducted the operations of the express business through such express agency, and on the Seaboard Air Line Railway in particular. In taking over the American Railway Express Company, the Railway Express Agency, Inc., assumed (see Poor's Manual of Rail-

roads, p. 1729, 1929) all leases and contracts pertaining to the express transportation business and agreed to liquidate and settle accounts of the American Railway Express Company arising out of the conduct of the express business prior to March 1, 1929.

The joint railway-express agents on the Seaboard Air Line Railway, through their General Committee of The Order of Railroad Telegraphers, held schedule contract with the Southern Express Company governing rules, commission rates and transfer allowances for the handling by them of the express transportation business at their railroad stations, last revised as of August 1, 1917. This contract is signed by J. B. Hockaday, Vice-President for the Eastern Department, and by W. S. McFarland, Vice-President and General Manager for the Western Department, for the Southern Express Company, and by D. May, General Chairman of The Order of Railroad Telegraphers for the joint agents, at Atlanta, Ga., on August 18, 1917, and effective as of August 1, 1917.

Article 14 of the schedule contract reads:

"No change will be made in the foregoing articles until after notice of thirty (30) days, in writing, has been given."

No notice of change in any of the articles of the contract has ever been submitted in writing or otherwise to the General Committee of the joint agents, since executed.

The American Railway Express Company, organized during Federal control as a joint operating company for the Southern Express Company, assumed all contracts of the Southern Express Company, and the contract of the

Southern Express Company with the General Committee of The Order of Railroad Telegraphers in behalf of the joint agents in the employ of the Seaboard Air Line Railway can be made no exception. This contract was observed and complied with by the American Railway Express Company with respect to the handling of express business at the stations of the joint agents, their commission rates, transfer allowances, and handling of grievances of the joint agents arising out of same.

Early in the year 1921 conditions made it desirable that the contract be revised by the Committee and conferences to that end were sought and held with Mr. W. P. Smith, Vice-President, American Railway Express Company, at Atlanta, Ga., on August 19, 1921, and on September 27, 1921. Conditions between the railroads and the express company, as well as with the joint agents, were very unsettled at this time, and as a result of these conferences it was decided by the Committee to await a more favorable opportunity.

The effort to revise the contract was renewed with Vice-President Smith of the American Railway Express Company on September 7, 1923, who advised that such matters were then handled by the Committee on Wages and Working Conditions of the express company at New York City, Mr. L. R. Gwyn, Chairman, to whom the Committee's request was referred. Chairman Gwyn of the Express Company advised us under date of September 17, 1923, by letter, that he could not properly deal with our organization as in his opinion the men involved were employes of the railroad and that the Labor Board, in Decision No. 757, had taken the same view, and that service performed by such railroad employes for the express company was incidental and would not constitute the express company as being their employer, nor them to be

its employes, within the meaning of the Transportation Act, 1920; and further, as collective bargaining assumed a relation as employer and employe, it did not appear the express company was in a position to deal with us on that basis. Mr. Gwyn declined any knowledge that his company had ever made any agreement with our organization.

In view of the existence of the agreement entered into by the Southern Express Company with our organization on the Seaboard Air Line Railway as late as August 1, 1917, which contract was taken over by the American Railway Express Company as the operating company, the position taken by Mr. Gwyn was not acceptable, and the dispute was referred to the United States Railroad Labor Board by us, in ex parte, in October, 1923, citing the American Railway Express Company.

The Labor Board held hearing in the dispute on February 15, 1926, and as stated by the Board in its decision, there appeared to be a division of opinion (between the Express Company and the Carrier) as to who should accept the responsibility—the duty and obligation of determining with whom the employes shall meet and negotiate —and that they should, for the best interest of all concerned, settle this question; and the Board promulgated the following decision in Decision No. 4087, Docket 3049, on March 19, 1926:

"*Decision:* The Railroad Labor Board directs that in the case of each dispute duly authorized representatives of the carrier, or carriers, involved, and of the express company shall promptly confer and decide with whom the employes shall negotiate to a conclusion the question in dispute. Following such designation, negotiations shall be promptly conducted."

Neither the Seaboard Air Line Railway nor the American Railway Express Company ever notified our Committee whether, in compliance with the above Decision No. 4087, the railroad or the express company was designated as the party with whom we should negotiate in matters arising out of joint agents handling express business at their stations. We attempted to negotiate such matters with the management of the railroad in April, 1932, but made no progress whatever, and upon invoking the services of the United States Board of Mediation, the carrier declined to arbitrate.

Effective as of April 1, 1930, the Railway Express Agency arbitrarily placed in effect a flat rate of commission on carload shipments to the joint agents of $5.00 per car, without notice or conference with our Committee.

The Express Company has also made individual agreements with certain of the joint agents to handle the express business on a straight commission basis without regard to the guaranteed minimum of ten dollars ($10.00) per month established by Article 2 of the Express Agreement.

The Express Company has further arbitrarily reduced the amount of the transfer allowance and made individual agreements with certain of the joint agents to reduce the allowances below that specified in Article 3 of the express agreement, without notice to or conference with the Committee.

In attempting to treat with the Railway Express Agency on these matters of violation of the express agreement, the Express Company assumes the attitude that our organization has no agreement with the Express Company, and declines to recognize our Committee as the representative

designated by the joint agents to handle such matters, and has declined to join with us in submitting the dispute to the National Railroad Adjustment Board.

It is the contention of the representative committee of these joint agents that the Express Agreement entered into with this Committee by the Southern Express Company, effective as of August 1, 1917, is a contract duly executed between the parties, and that such contract was observed and complied with by the succeeding Express Company—the American Railway Express Company—and has not been abrogated in any manner since executed.

The Committee further contends that the Railway Express Agency, Inc., upon taking over the express transportation business of the Southern Express Company on the Seaboard Air Line Railway, as succeeded by the American Railway Express Company, assumed this contract with all other contracts of the American Railway Express Company, and is, therefore, obligated under the contract to the same extent and in the same manner as the Southern Express Company, with whom it was executed, and as the American Railway Express Company, its successor.

Article 2 of the Express Agreement in question provides:

"Commissions on total business received and forwarded, based on previous year's business, will be paid as follows:

"When commissions do not exceed fifty dollars per month, ten percent.

"When commissions exceed fifty dollars per month, but not more than seventy-five dollars per month, nine percent.

"When commissions exceed seventy-five dollars per month, but not more than one hundred dollars per month, eight percent.

"When commissions exceed one hundred dollars per month, seven percent.

"When commissions do not exceed ten dollars per month, a guarantee of ten dollars per month will be paid."

This article governs the commission rate to be paid the joint agents and establishes the procedure in determining the commission basis for the succeeding years, with a guaranteed minimum.

Article 3 of the agreement provides:

"At points where agents are required to transfer express matter to or from other lines or trains, they will be paid a minimum of ten dollars ($10.00) per month for such service."

This article establishes the definite amount of monthly allowance to railway agent for transfer service.

The commission rates and the transfer allowances have, and are being, arbitrarily reduced and individual agreements forced on the joint agents by the Express Company with the consent of the Railroad Company, in violation of the Express Agreement and Articles 2 and 3 thereof.

The Committee contends that the Express Agreement of August 1, 1917, shall be observed and complied with in full by the Railway Express Agency, Inc.

And the Committee also contends that the rate of commission for handling express business on the Seaboard Air Line Railway, where arbitrarily reduced or reduced through individual agreement, in violation of Article 2 of the Express Agreement, shall be restored to the schedule rate and all joint agents reimbursed retroactively to the date reduced. And the Committee further contends that the transfer allowance, where arbitrarily reduced or reduced by individual agreement, in violation of Article 3 of the Express Agreement, shall be restored to the schedule amount and agents reimbursed retroactively to the date reduced.

In support of statements made herein, we submit the following exhibits:

Employes' Exhibit "A"—Copy Express Agreement of July 1, 1909.

Employes' Exhibit "B"—Copy of Express Agreement of June 1, 1912.

Employes' Exhibit "C"—Copy of Express Agreement of August 1, 1917.

Employes' Exhibit "D"—Copy of exchange of correspondence between the Local and General Chairmen with Superintendent Scruggs and General Manager McFarland of the Express Company, and with Vice-President Cahill of the railroad, respecting the claim of the express agent at Santos, Fla., and Terra Ceia, Fla., in October, 1925, indicating clearly the agreement was in effect and was being observed in the handling of such grievances.

Employes' Exhibit "E"—Copy of letters from Superintendents Scruggs and May of the Railway Express Agency placing a rate of $5.00 commission in effect arbitrarily in

violation of Article 2 of the agreement which establishes a rate of seven to ten percent, and without conference with the Committee, as provided in Article 14 of the agreement and the provisions of the Railway Labor Act.

Employes' Exhibit "F"—Copy of letters from Associate Commissioner Morgan, of the Alabama Public Service Commission, to W. M. Smith, Superintendent, Railway Express Agency, Inc., regarding testimony submitted the Commission under oath by Mr. Walker of the Express Company to the effect that the minimum wage paid the joint agents was a matter of contract between the Railway Express Agency and The Order of Railroad Telegraphers, with copy of letter to Superintendent Smith by Vice-President Bryant of The Order of Railroad Telegraphers on the subject.

Employes' Exhibit "G"—Copy of letter by Superintendent R. K. Smith of Railway Express Agency at Jacksonville, Fla., to Joint Agent O. F. Smith, Pembroke, Ga., dated January 23, 1935, to indicate that the commission rates of Article 2 of the Express Agreement were being observed and in effect, in support of our contention to that effect.

Employes' Exhibit "H"—Copy of letters from joint agents at Zellwood and Brooker, Fla., testifying in support of our contention that efforts were being made to negotiate individual agreements.

Employes' Exhibit "I"—Copy of exchange of correspondence betweeen the General Chairman of The Order of Railroad Telegraphers, M. H. Cahill, Vice-President, Seaboard Air Line Railway, and W. S. McFarland, General Manager, American Railway Express Company, in June, 1925, as evidence in support of Committee's conten-

tion that the Commission rates of the Express Agreement were being perpetuated by the Express Company.

In conclusion, the Committee desires to briefly state that its contentions in this dispute are:

1. That the Express Agreement executed between the Southern Express Company and the Committee of The Order of Railroad Telegraphers in behalf of the joint railway-express agents, on August 1, 1917, governing commission and transfer allowance rates, was assumed by its successors—the American Railway Express Company and the Railway Express Agency, Inc.; is still in effect, and that the Railway Express Agency, Inc., be required to observe the agreement in full.

2. That at joint agencies where these rates have been arbitrarily reduced or reduced through individual agreement, in violation of the Express Agreement, that the rates be restored retroactively to the date reduced, to conform with the rates established in the Express Agreement, and the joint agents reimbursed accordingly.

Oral hearing is requested.

R. F. THOMPSON,
General Chairman, The Order of Railroad Telegraphers.

Approved for submission to the Board.

E. F. MANION,
President, The Order of Railroad Telegraphers.

93

"EXHIBIT No. 3-A."

(Employes' Exhibit No. "A".)

Rates of Pay and Regulations

for

Joint Express and Railway Agents on the Seaboard Air Line Railway Co.

Effective July 1st, 1909. The following rules and rates of pay will govern the Southern Express Agents, who are jointly employed as Railway and Express Agents on the Seaboard Air Line Railway.

Article I.

This schedule applies solely to the Express Agents above designated, who have hitherto been paid on a commission basis.

Article II.

A commission of Ten (10) per cent will be paid to Agents in the States of Virginia, North Carolina, South Carolina, Georgia and Alabama on the gross earnings of the Southern Express Company.

When commissions do not exceed five ($5) dollars per month, a guarantee of five ($5) dollars per month will be paid.

When commissions exceed five ($5) dollars per month and do not exceed seven dollars and fifty cents ($7.50) per month, a guarantee of seven dollars and fifty cents ($7.50) per month will be paid.

Article III.

A commission of ten (10) per cent will be paid Agents in the State of Florida on the gross earnings of the Southern Express Company for merchandise and money.

Where commissions do not average ten ($10) dollars per month, based on previous year's business, a rate of seven (7) per cent on the gross revenue of the Southern Express Company for perishables received and forwarded will be paid.

In excess of ten ($10) dollars per month and not more than twenty ($20) dollars per month, six (6) per cent will be paid on perishables received and forwarded.

In excess of twenty ($20) dollars per month, five (5) per cent will be paid on perishables received and forwarded.

When commissions do not exceed five ($5) dollars per month a minimum of five ($5) dollars per month will be paid.

Article IV.

At points where Agents are required to transfer express matter to or from other lines or trains, they will be paid a minimum of five ($5) dollars per month for such service.

Article V.

It shall be optional with Agents whether they accept matter on Sunday to be forwarded, except in cases of emergency.

Article VI.

All disputed claims for loss or damage arising between the Southern Express Company and its Agents herein represented, which cannot be satisfactorily adjusted otherwise, may be referred to the Superintendent and the General Chairman representing such employees for settlement.

Article VII.

Agents are expected to observe all rules of the Express Company; render their reports and accounts for paid C. O. D.s promptly, also do all in their power to advance the interests of the Express Company and popularize its service.

Article VIII.

The present method of computing Agents' commissions being the only satisfactory way of preventing errors, disputes and mixtures in accounts, it will be continued, with the promise that every effort will be made to effect settlement during the succeeding month.

Duplicate vouchers showing earnings will be prepared and one copy furnished to Agents.

Article IX.

These rules are not to be construed so as to reduce compensation at points where the rate of pay is in excess of above rates.

Article X.

No change will be made in the foregoing articles until after a notice of thirty (30) days has been given.

For Southern Express Company:

D. B. HOCKADAY,
General Superintendent.

For Southern Express Agents:

D. MAY,
Chairman Agents' Committee.

95 "EXHIBIT No. 3-B."

(Employes' Exhibit No. "B".)

Rates of Pay and Regulations

for

Joint Express and Railroad Agents on the Seaboard Air Line Railway.

Effective June 1, 1912, the following rules and rates of pay will govern the Southern Express Company's agents who are jointly employed as Railroad and Express agents on the above named railroads:

Article 1.

This schedule applies solely to Express Agents as above designated who have hitherto been paid upon a commission basis.

Article 2.

A commission of ten (10%) per cent will be paid agents in the States of Virginia, North Carolina, South Carolina, Georgia and Alabama on the gross earnings of the Southern Express Company.

A commission of ten (10%) per cent will be paid agents in the State of Florida on the gross revenue of the Southern Express Company, received and forwarded; and where commissions do not average $10.00 per month (based on previous year's business) a rate of ten (10%) per cent on the gross revenue of the Southern Express Company for perishables forwarded will be paid. In excess of $10.00 per month and not more than $25.00 per month, a commission of eight (8%) per cent will be paid on perishables forwarded. In excess of $25.00 per month and not over $50.00 per month, a commission of seven (7%) per cent will be paid on perishables forwarded. In excess of $50.00 per month, a commission of six (6%) per cent will be paid on perishables forwarded.

When commissions do not exceed seven dollars and fifty cents ($7.50) per month and do not exceed ten ($10.00) dollars per month, a guarantee of ten ($10.00) dollars per month will be paid.

Article 3.

At points where agents are required to transfer express matter to or from other lines or trains, they will be paid a minimum of seven and one-half dollars ($7.50) per month for such service.

Article 4.

It shall be optional with agents as to whether or not they accept shipments to be forwarded on Sunday, except

in cases of emergency, and will be otherwise excused from express duties as far as possible on this day.

Article 5.

All grievances and claims for loss or damage arising between the Southern Express Company and its agents herein represented, which cannot be satisfactorily adjusted otherwise, may be referred to the Superintendent and General Chairman representing such employes, for adjustment, with the right of appeal reserved, provided an amicable adjustment cannot be so reached.

Article 6.

During that period the Express Company undertakes the bonding of employes, the bond premium now being twenty-five (25) cents per hundred dollars; this rate will not be increased without the consent of the committee representing such agents herein specified—the amount of bond to be fairly based upon the amount of business handled; Provided, that the minimum bond shall be $500.00.

Article 7.

Agents are expected to observe all rules of the Express Company, render their reports, account for collections promptly, and do all in their power to advance the interests of the Express Company and popularize its service.

Article 8.

The present method of computing agents' commissions being the only satisfactory way of preventing errors, dis-

putes and mixtures in accounts, it will be continued, with the promise that every effort will be made to effect settlement during the succeeding month.

Duplicate vouchers, showing earnings, will be prepared and one copy furnished the agents.

Article 9.

These rules are not to be construed so as to reduce compensation at points where the rate of pay is in excess of the above rates.

Article 10.

No change will be made in the foregoing Articles until after notice of thirty (30) days, in writing, has been given.

For Southern Express Company:
(Signed) By W. EGLESTON,
Superintendent.
(Signed) By W. K. HAILE,
Superintendent.

For Southern Express Agents:
(Signed) By F. O. CUMMING,
Committeeman.

Approved:
(Signed) J. B. HOCKADAY,
General Manager, Southern Express Co.

97 "EXHIBIT No. 3-C."

(Employes' Exhibit No. "C":)

Southern Express Company.

Rates of Pay and Regulations for Joint Express and Railroad Agents on the Seaboard Air Line Railway:

Effective August 1st, 1917, the following rules and rates of pay will govern the Southern Express Company's Agents who are jointly employed as railroad and express agents.

Article 1.

This schedule applies solely to express agents as above designated.

Article 2.

Commissions on total business received and forwarded, based on previous year's business, will be paid as follows:

When commissions do not exceed fifty dollars per month, ten per cent.

When commissions exceed fifty dollars per month, but not more than seventy-five dollars per month, nine per cent.

When commissions exceed seventy-five dollars per month, but not more than one hundred dollars per month, eight per cent.

When commissions exceed one hundred dollars per month, seven per cent.

When commissions do not exceed ten dollars per month, a guarantee of ten dollars per month will be paid.

Article 3.

At points where Agents are required to transfer express matter to or from other lines or trains, they will be paid a minimum of ten dollars ($10.00) per month for such service.

Article 4.

It shall be optional with Agents as to whether or not they accept shipments to be forwarded on Sunday except in cases of emergency and will be otherwise excused from express duties as far as possible on this day.

Article 5.

All grievances and claims for loss or damage arising between the Southern Express Company and its agents herein represented, which cannot be satisfactorily adjusted otherwise may be referred to the Superintendent and General Chairman representing such employes for adjustment, with the right of appeal reserved provided an amicable adjustment cannot be reached.

Article 6.

The Southern Express Company will pay the premiums on the bonds of Agents covered by this agreement.

Article 7.

When necessary, porters will be provided on trains, or arrangements made with train crews to assist in loading

and unloading freights. When this cannot be done other arrangements will be made.

Article 8.

Agents are expected to observe all rules of the Express Company, render their reports and account for collections promptly and do all in their power to advance the interests of the Express Company and popularize its service.

Article 9.

Agents will be allowed to deduct their commissions at the close of each report.

Article 10.

Agents will not be expected to meet trains at unreasonable hours.

Article 11.

Employes covered by this agreement will be paid eight dollars ($8.00) per day while attending Court on account of the Southern Express Company, for such service.

Article 12.

These rules are not to be construed so as to reduce compensation at points where the rates of pay are in excess of the above rates.

Article 12.

A commission of fifty percent will be paid on all money orders and travelers checks. The following named rates

will be paid on C. O. D. checks issued in payment of C. O. D.'s:

Where the charges amount to:	The Company will pay the agent:
.15 cents	.03 cents
.20 cents	.04 cents
.25 cents	.05 cents
.30 cents	.06 cents
.35 cents	.07 cents
.50 cents	.10 cents
.60 cents	.12 cents

and proportionately on C. O. D.'s in excess of $300.00.

Article 14.

No change will be made in the foregoing articles until after notice of thirty (30) days, in writing, has been given.

For Southern Express Company:
(Signed) J. B. HOCKADAY,
(Signed) W. S. McFARLAND.

For the Joint Agents:
(Signed) D. MAY.

Atlanta, Ga., August 18th, 1917.

99 "EXHIBIT No. 3-D."

(Employes' Exhibit No. "D".)

American Railway Express Co.,

Jacksonville, Fla.

200

October 21, 1925.

Mr. D. May,
General Chairman,
Order of Railroad Telegraphers,
Carlton, Ga.

Dear Sir:

Commission Payments to Agents on the Seaboard Air Line Railway.

Acknowledging yours of October 10th on this subject and also referring to our personal conversation in my office.

I will be very glad if you will advise me with reference to my letter to you of August 17th, the fifth paragraph thereof, at which time I hope to be in position to advise you in the matter.

Yours truly,
(Signed) A. B. SCRUGGS,
Superintendent.

100

"EXHIBIT No. 3-D."

(Employes' Exhibit No. "D".)

Re: Express Commissions at Terra Ceia, Fla.

Berkeley, Ga., October 10th, 1925.

(P. O. Carlton, Ga.)

Mr. A. B. Scruggs, Superintendent,
American Railway Express Company,
Jacksonville, Fla

Dear Sir:

Referring to our conference in your office on September 5th, with respect to claim of Mr. J. H. Britt for $52.43, which represents the difference between 9 and 10 percent commissions for the year 1923.

It was my understanding that you would handle this matter with the General Manager and let me have your decision within a reasonable length of time.

It has now been over a month since we discussed this claim and I will appreciate it very much if you will kindly favor me with your decision.

Yours very truly,

(Signed) D. MAY,
General Chairman.

101 "EXHIBIT No. 3-D."

(Employes' Exhibit No. "D".)

American Railway Express Co.

Jacksonville, Fla.

200

August 17, 1925.

United States Mail.

Mr. D. May, General Chairman,
Order of Railroad Telegraphers,
Carlton, Georgia.

Dear Sir:

Commission Payments to Agents on the Seaboard Air Line Railway.

With further reference to yours of July 25th with reference to claims of J. H. Britt of Terra Ceia for $52.45 which represents the difference between 9 and 10 percent commissions for the year 1923, which he claims the Express Company is due on commissions.

Before considering refund of this amount to Mr. Britt at Terra Ceia, will it be agreeable with you, and will you back the thought of asking for refund from agents where they deducted 10 percent commissions when they should have figured on 7 and 9 percent?

For instance, I will refer you to the office at Manatee, Fla., where during 1923 he should have figured 7 percent, whereas he figured 10, or overpaid $650.07, and in 1924, he was overpaid $320.58.

The office at Apopka, Fla., during 1923, was overpaid in commissions amounting to $717.30, and in 1924 $411.24.

There are numerous other offices that can be recommended, advising that the commissions were not figured in accordance with the basis, or overpaid, and I presume that you will willingly agree to see the Company reimbursed at these points if the agent at Terra Ceia is paid the $52.45.

This was brought around by our commission agents taking the higher rate than what they were entitled to until we could get this subject reduced to a system sometime last year.

Yours very truly,
(Signed) A. B. SCRUGGS,
Superintendent.

102 "EXHIBIT No. 3-D."

(Employes' Exhibit No. "D".)

American Railway Express Co.

Jacksonville, Fla.

200

July 30, 1925.

Mr. D. May,
General Chairman,
Berkley, Ga.
(P. O. Carlton, Ga.)

Dear Sir:

Commission Payments to Agents on the Seaboard Air Line Railway.

I beg to acknowledge yours of July 25th with reference to Local Chairman Leverette's letter of June 29th on this subject.

I wish to advise the matter is having my attention but at this time I am not in position to advise you definitely my final answer to the matter. I hope to do so as early as possible.

Yours truly,
(Signed) A. B. SCRUGGS,
Superintendent.

Copy to:
Mr. J. C. Leverette,
Orange Heights, Fla.

103 "EXHIBIT No. 3-D."

(Employes' Exhibit No. "D".)

Re: Express Commissions at Terra Ceia, Fla.

Berkeley, Ga., July 25th, 1925.

(P. O. Carlton, Ga.)

Mr. A. B. Scruggs, Superintendent,
American Railway Express Company,
Jacksonville, Fla.

Dear Sir:

I will thank you to kindly refer to Local Chairman Leverette's several letters in connection with the claim of Agent J. H. Britt of Terra Ceia, Fla., for $52.45, which amount represents the difference between nine and ten percent commissions for the year 1923, and kindly advise as to whether or not you are in position to favor us with an adjustment of same?

You will note from Mr. Leverette's letters to you, that, total commissions paid at Terra Ceia for the year 1922 fell below the average of $50.00 per month, therefore, the agent should have been allowed ten percent for 1923.

Hoping to receive a favorable reply at your earliest convenience, I am,

Yours very truly,
(Signed) D. MAY,
General Chairman.

CC Mr. J. G. L., L. C.,
Orange Heights, Fla.

104 "EXHIBIT No. 3-E."

(Employes' Exhibit No. "E".)

Railway Express Agency, Inc.

Jacksonville, Fla.

508

March 25, 1930.

Mr. R. J. Richards, Agent,
Railway Express Agency, Inc.,
Edison, Ga.

Dear Sir:

Under the terms of the Standard Operating Agreement between the Railway Companies (including Seaboard Air Line Railway Company), and Railway Express Agency, Inc., the Express Agency is required to pay to the Railroad Companies 85% of the gross express revenue on carload shipments, which leaves the Express Agency only 15% of the gross express revenues from which to pay all of the expenses, other than transportation, of handling carload shipments at shipping, destination and intermediate points, a good deal of telegraphing, supervision, traffic accounting and possible claims.

It will be apparent to you that, under these circumstances, the usual percentage rates of agency commissions cannot be applied. Instead, you will be allowed compensation of $5.00 a car on each carload shipment forwarded from or received at your office, which I am confident you will find is reasonable compensation.

A carload shipment consists of a car loaded from one consignor to one consignee at one destination, moving

under rates which exclude vehicle service. The compensation of $5.00 a car will become effective with business on and after April 10, 1930.

The compensation of $5.00 a car should be entered in agent's commission voucher under classification of "Commission of Special Revenue as per detail on reverse side" of the monthly balance sheet, form 96-b.

Please acknowledge receipt of this letter.

Yours truly,

(Signed) A. B. SCRUGGS,

Superintendent.

105 "EXHIBIT No. 3-E."

(Employes' Exhibit No. "E".)

Railway Express Agency,

Pamlico Division,

Norfolk, Va.

E-508

April 8th, 1930.

Copy to—Mr. W. W. Owens, Mr. J. T. White.

Mr. W. A. Joyner,
Agent,
Branchville, Va.

Dear Sir:

Under the terms of the Standard Operating Agreement between the Railway Companies (including Sea-

board Air Line Railway Company), and Railway Express Agency, Inc., the Express Agency is required to pay to the Railroad Companies 85% of the gross express revenue on carload shipments, which leaves the Express Agency only 15% of the gross express revenues from which to pay all of the expenses, other than transportation, of handling carload shipments at shipping, destination and intermediate points, a good deal of telegraphing, supervision, traffic accounting and possible claims.

It will be apparent to you that, under these circumstances, the usual percentage rates of agency commissions cannot be applied. Instead, you will be allowed compensation of $5.00 a car on each carload shipment forwarded from or received at your office, which I am confident you will find is reasonable compensation.

A carload shipment consists of a car loaded from one consignor to one consignee at one destination, moving under rates which exclude vehicle service. The compensation of $5.00 a car will become effective with business on and after April 10th, 1930.

The compensation of $5.00 a car should be entered in Agent's Commission Voucher under classification of "Commission of Special Revenue as per detail on reverse side" of the monthly balance sheet, form 96-b.

Please acknowledge receipt of this letter.

Yours truly,

(Signed) R. H. MAY,

Superintendent.

106 "EXHIBIT No. 3-F."

(Employes' Exhibit No. "F".)

January 14, 1932.

Mr. W. M. Smith, Supt.,
Railway Express Agency, Inc.,
88 Luckie St., N. W.,
Atlanta, Ga.

Dear Sir and Brother:

Referring to letter from Mr. Frank P. Morgan, Associate Commissioner of the Alabama Public Service Commission, under date of December 17, 1932, having reference to the closing of the express agency at Odenville, Ala.

Inasmuch as our contract provides for a minimum of Ten Dollars per month, and the further fact that we are endeavoring to revise all express contracts, our committee would not be agreeable to any change in the present minimum at this time, however, if it is your desire to discuss the matter further, we shall be very glad to meet with you at some mutually convenient time.

Yours very truly,
(Signed) S. E. BRYANT,
Vice-President.

cc—Mr. Frank P. Morgan,
Associate Commissioner,
Alabama Public Service Commission,
Montgomery, Ala.

107 "EXHIBIT No. 3-F."

(Employes' Exhibit No. "F".)

Alabama Public Service Commission,

Montgomery.

December 17, 1931.

Mr. W. M. Smith, Supt.,
Railway Express Agency,
88 Luckie St., N. W.,
Atlanta, Ga.

In re: AP. S. C. Docket 6258: Petition for Authority to Discontinue petitioner's agency at Odenville, Alabama.

The above petition was heard by the Commission in Birmingham, Alabama, on November 25, 1931, and on account of the testimony of your Mr. Walker to the effect that the minimum wage paid your company's agents was a matter of contract between the Railway Express Agency and The Order of Railway Telegraphers, I addressed a letter to Mr. S. E. Bryant, Vice-President of The Order of Railway Telegraphers, on December 3, 1931. A copy of this letter is herewith enclosed.

I am also enclosing a copy of Mr. Bryant's reply to my letter and after discussing this matter with the other members of the Commission, it is the Commission's view that a period of thirty days should be allowed by the Commission for negotiations between your Company and The Order of Railway Telegraphers in reference to any readjustment which might be agreed upon concerning the minimum rate of pay at this agency.

The Commission will, therefore, hold the matter in abeyance until January 17th and trusts that both parties will notify us of the results of any conference which may be held.

Yours truly,
(Signed) FRANK P. MORGAN,
Associate Commissioner.

CC—to Mr. S. E. Bryant, V. P.,
Order of Railway Telegraphers,
3831 Baxter Ave.,
Nashville, Tenn.

108 "EXHIBIT No. 3-G."

(Employes' Exhibit No. "G".)

Railway Express Agency, Inc.

Jacksonville, Florida, January 23, 1935.

Copy to—Route Agent Marshall, Dist. Acct. Tanner.

Agent O. F. Smith,
Pembroke, Ga.

Agency Commissions, Pembroke, Ga.

According to scale of commission rates applying at offices on your road, the rate of commission paid you as shown is subject to change with certain specified variations of the amount of commission "the previous year", with which you are familiar.

The agency commission earned at your office during the twelve months ending December 31, 1934, at the rate of

10% averaged $54.73 a month and on that basis the commission rate now to apply will be 9%.

Be governed accordingly.

(Signed) R. K. SMITH,
Superintendent.

48

109 "EXHIBIT No. 3-H."

(Employes' Exhibit No. "H".)

Railway Express Agency, Inc.

Jacksonville, Fla., June 5, 1935.

503

Agent L. R. Waters,
Brooker, Fla.

Express Agency, Brooker, Fla.

Herewith B&E statement showing the business which we have done at Brooker for the twelve months ended with April, 1935.

You were paid a guarantee of $10.00 per month for the handling of this business, but the business done is not sufficient to justify the continuance of payment of this sum, as I think you will agree after the statement has been covered month by month.

We cannot continue to pay so large a sum for the operation of the Brooker office, and I am compelled to ask you to agree to handle on a basis of 10% commission without guarantee.

I may further add that if you cannot see our way clear to do this I shall be compelled to ask the Florida Railroad Commission for authority to close the office outright.

Let me know please, after the matter has been carefully considered, so that we may know what further steps may be taken to bring down the cost of operation at Brooker, Fla.

(Signed) R. K. SMITH,
Superintendent.

110 "EXHIBIT No. 3-I."

(Employes' Exhibit No. "I".)

Seaboard Air Line Railway Company,

Operating Department.

Compensation of B. F. Hazen, Ex-Agent, American Railway Express Company, Santos, Florida—Claim for $37.77—the difference in the amount actually allowed and the guaranteed minimum of $10. per month.

Norfolk, Virginia, July 1st, 1925.

sl—file 15718.

Mr. D. May, General Chairman,
The Order of Railroad Telegraphers,
Berkeley, Ga. (Carleton, P. O.).

Dear Sir:

Referring further to your letter of June 6th and returning enclosures, above subject. We enclose copy of our letter to General Manager McFarland of the American

Railway Express Company of June 16 and copy of his reply of June 26.

You will note he states that the declination of this claim was based on the fact that the $10. minimum per month did not apply to a forwarding office, but is only applicable to regular agencies which handle both received and forwarded business and that the Southern Express Company so applied its agreement which was previously in effect and on which the American Railway Express Company has based its decision.

This seems to dissolve itself into a question of facts as to the actual interpretation and practice in effect under the Southern Express Company's agreement.

Unless you can substantiate your claim by showing the actual practice and interpretation of the Southern Express Company's agreement when it was in effect, we are unable to help you in this matter.

Yours very truly,
(Signed) M. H. CAHILL,
Vice-President.

111 "EXHIBIT No. 3-I."

(Employes' Exhibit No. "I".)

American Railway Express Company.

Atlanta, Ga., June 26, 1925.

Mr. H. M. Cahill,
Vice-President, S. A. L. Ry. Co.,
Norfolk, Va.

Dear Sir:

Referring to yours of June 16th, file 15718 on above subject.

As indicated in your letter the American Railway Express Company has no agreement with the Order of Railroad Telegraphers but the Southern Express Company did have one and this Company has perpetuated the rates of commission as therein provided.

The claim of Ex-Agent Hazen was declined because he served at only a forwarding office and under the scale adopted by this company minimum of $10. a month did not apply to only forwarding offices.

The minimum guarantee of $10. a month is applicable to regular agencies which handle both received and forwarded business, which was not the case at Santos, Fla., which was a forwarding office only during the vegetable season.

It is my information that the agreement with Agents on the Seaboard Air Line was so applied by the Southern Express Company.

Yours truly,
(Signed) W. S. McFARLAND,
General Manager.

112 "EXHIBIT No. 3-I."

(Employes' Exhibit No. "I".)

Seaboard Air Line Railway.

SL—File—15718.

Compensation of B. F. Hazen, Ex-Agent, American Railway Express Company, Santos, Fla.,—Claim for $37.77—the difference in the amount actually allowed and the guaranteed minimum of $10. per mo.

Mr. W. S. McFarland, General Manager,
American Railway Express Company,
Room 303, 27 Luckie Street,
Atlanta, Georgia.

Norfolk, Virginia, June 16, 1925.

Dear Sir:

All papers in the claim of Ex-Agent B. F. Hazen, Santos, Fla., against the American Railway Express Company for $37.77—difference in amount actually allowed and guaranteed minimum of $10. per month, have been referred to this office by General Chairman of the Order of Railroad Telegraphers, which claim is covered by your letter of Nov. 26, 1924, copy attached.

We will appreciate advice from you as to the basis of your declination of this claim. We understood from Vice President Smith, when handling another claim with him, that while your Company has no agreement with the Order of Railroad Telegraphers, yet you have a practice carried over from the practice of the Southern Express Company with respect to the payment of express commissions. It is our understanding, that under the South-

ern Express Company's agreement payments were made as claimed by the Agent in this case, therefore, we will appreciate advice from you as to this.

Yours very truly,
(Signed) M. H. CAHILL,
Vice-President.

113 "EXHIBIT No. 3-I."

(Employes' Exhibit No. "I".)

Re: Compensation of B. F. Hazen, Ex Agent, American Railway Express Co., Santos, Fla. Claim for $37.77, the difference in the amount actually allowed and the guaranteed minimum of $10.00 per month.

Berkeley, Ga., June 6th, 1925.

(P. O. Carlton, Ga.)

Mr. M. H. Cahill, Vice-President,
Seaboard Air Line Railway Co.,
Norfolk, Va.

Dear Sir:

Referring to our conference May 26th, with reference to claim of Mr. B. F. Hazen for $37.77 vs. American Railway Express Co., as to minimum of $10.00.

Would suggest that Vice-President Mr. Smith of the Express Company has declined to handle this matter stating that the Seaboard Air Line Railway Co. is primary employer, consequently such claims should be adjusted through them.

Our contract with the Express Co. as of August 1st, 1917, states explicitly in Article 2, past paragraph, "When

commissions do not exceed $10.00 per month, a guarantee of $10.00 per month will be paid." Would suggest that there is nothing in said contract which excludes forwarding agencies only. This contract should be interpreted as written, and where there is no specific clause making forwarding offices an exception, such minimum of $10.00 should be paid.

I am attaching an exact copy of my file and will thank you to kindly handle for adjustment.

Yours very truly,
(Signed) D. MAY,
General Chairman.

114 "EXHIBIT No. 3-J."

(Employes' Exhibit No. "J".)

Photostat Copy of Memorandum of Agreement Between The United States and The Express Companies, Including The Southern Express Company.

Memorandum of Agreement Between The United States and The Express Companies.

"This agreement made this 21st day of June, 1918, between William G. McAdoo, Director General of Railroads, hereinafter called the Director General, acting on behalf of the United States and the President, under the powers conferred on him by proclamations of the President hereinafter referred to, and the Adams Express Company, American Express Company, Southern Express Company, and Wells, Fargo & Company, hereinafter referred to as the Express Companies,

Witnesseth,

Whereas the President of the United States, on December 28, 1917, acting under the powers conferred on him

by the Constitution and laws of the United States, including those conferred by Section 1 of the Act of Congress entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916, took possession and assumed control of certain railroads and systems of transportation, and has since operated and controlled the same; and

Whereas, by a proclamation dated March 29, 1918, the President of the United States authorized William G. McAdoo as Director General of Railroads, to make any and all contracts or agreements which in any way may be found necessary or expedient in connection with the Federal control of systems of transportation, as fully in all respects as the President is authorized to do; and

Whereas said railroads and systems of transportation, taken over as aforesaid, include various railroads theretofore operated by companies which had, by written contracts, agreed to furnish to the individual express companies aforesaid certain privileges, facilities, and transportation for the carrying on of the express transportation business of said express companies in the United States; and

Whereas said railroad companies are now unable, and will hereafter be unable, except through the Director General, to perform said contracts so long as the railroad properties formerly operated by them, respectively, remain under Federal control; and

Whereas the Director General has determined that in the public interest and in view of the necessities of the Government in time of war, he should take over and conduct the express transportation service upon the railroads and systems of transportation under Federal control, and has, therefore, found it inexpedient to carry out and per-

form the individual contracts of such railroad companies with the several express companies aforesaid; and

Whereas the Director General desires to secure the continuance of the trained forces of said Express Companies, so far as may be necessary, in said proposed express transportation business, to the end that the same may be conducted with the greatest possible efficiency; and

Whereas said Express Companies are willing to aid in placing at the service of the Director General their operating property and trained forces upon reasonable terms; and

Whereas the Director General is of the opinion that the express transportation business upon the railroads and systems of transportation under Federal control can be most efficiently carried on through the agency of a single corporation, which shall act as the sole agent of the Government in conducting said business:

Now, therefore, in consideration of the premises and of the covenants herein contained, the said parties have made the following agreement:

First, That the Express Companies, as soon as may be after the date hereof, shall cause to be organized a corporation for the purpose of carrying on for the Director General the express transportation business upon the railroads and systems of transportation under Federal control, and elsewhere as may be determined by the Director General, in connection with the express transportation business thereupon. Said corporation shall have a capital stock not exceeding forty million dollars ($40,000,000.00), and the shares shall be subscribed and purchased at par by the Express Companies before named.

Second. The Express Companies shall sell, convey, set over, and transfer to the said new corporation all property owned and used by them, respectively, in carrying on their express transportation business in the United States, including supplies and materials on hand in the supply departments and at the various offices of said companies, but not including cash or treasury assets, the aggregate value of which property is estimated to be, as of November 30, 1917, Thirty Million ($30,000,000.00) Dollars.

* * * * * * *

It is understood that said Express Companies are to transfer to the said new corporation as aforesaid all of their property aforesaid used and usable in the conduct of the express transportation business to be carried on as provided in this contract. * * *

The new corporation shall be furnished cash by the Express Companies in a sufficient amount to constitute reasonable working capital. No shares of capital stock shall be issued except on payment therefor at par in cash, or its equivalent in property at the fair market value thereof.

Third. Within the limit herein fixed the stock issued by said new corporation shall be sufficient to pay at par for the property so transferred to it and to provide the cash necessary for working capital. * * *

Fourth. The Express Companies further agree that they will without additional compensation assign, transfer, and tun over to the said new corporation as of July 1, 1918, any and all leases, contracts, or agreements relating to their express transportation business in the United States, except contracts for express privileges with railroads or systems of transportation now under Federal control.

As a condition of this agreement the Director General requires and the Express Companies consent that the several contracts of the Express Companies with the railroads and systems of transportation taken over by the Government under the President's proclamation of December 26, 1917, shall be canceled and annulled from and after July 1, 1918, and the parties hereby agree to take all necessary and proper steps in due time to bring about such cancellation and annullment of such contracts, which cancellation and annullment shall not affect rights at that time accrued and unsatisfied.

The Express Companies shall assign as far as possible all contracts with any rail, water or electric lines not taken over by the Government to said new corporation and shall not engage in the express transportation business in the United States during the period of contract between the Director General and said new corporation, except upon the approval of the Director General or when necessary to carry out a contract with a line not taken over by the Government and which they are unable to assign or cancel.

* * * * * * *

Fifth. Said Express Companies also agree that they will assent to, and, so far as they can, promote the employment by said new corporation of such of their officers, agents, and employees as may be necessary to the carrying on by it of said express transportation business aforesaid.

Sixth. The Director General agrees that upon the organization of the said new corporation he will enter into a contract with said new corporation upon the terms and conditions set forth in Exhibit "A" attached hereto and made a part hereof"

* * * * * * *

(Note: "Exhibit A" here referred to was not attached as part of Exhibit 3-J. This same "Memorandum of Agreement Between the United States and the Express Companies" was put in by the Railway Express Agency, Inc. at the hearing before the National Railroad Adjustment Board and is referred to in the Stipulation of Facts herein as part of Exhibit 6. The "Exhibit A" mentioned in the "Memorandum" was at that time put into the record. The "Memorandum" having been reproduced in the present record as "Exhibit 3-J" will not be again set forth as part of "Exhibit 6". but the omitted portion of the "Memorandum" that is "Exhibit A" thereof has been reproduced in this record and will be found captioned "Exhibit A" under and as a part of "Exhibit 6."

"Ninth. It is the intention that the provision herein made for carrying on the express transportation business through the agency of a single corporation shall continue in effect only during the period of Federal control, and nothing herein contained shall be construed as sanctioning any combination or merger of the properties or business of the Express Companies to last beyond that period.

Wherefore it is agreed that the Express Companies shall maintain their independent corporate existence, and that upon the termination of Federal control the property herein agreed to be conveyed by each of them to the new corporation (or the equivalent of such property) shall be reconveyed to it by the new corporation (back to them) at a valuation to be agreed upon or in the event of disagreement to be fixed by the Interstate Commerce Commission.

* * * * * * *

Execution.

In witness whereof these presents in quintuplicate originals have, on the day and year first above written, been duly signed and delivered by William G. McAdoo, Director General of Railroads, and duly signed, sealed, and delivered by * * * the Southern Express Company, by Thomas W. Leary, its president, thereto duly authorized by a vote of the directors of the Company at a meeting duly called and held on June 20th, 1918.

(Signed) W. G. McADOO,
Director General of Railroads.

* * * * * * *

SOUTHERN EXPRESS COMPANY,
(Signed) By THOMAS W. LEARY,
Its President."

120 "EXHIBIT No. 3-K."

(Employes' Exhibit No. "K".)

Photostat Copy of Record of Hearing and Order by Interstate Commerce Commission, Decided December 7, 1920, in the Matter of the Application for Consolidation of Express Companies.

59 I. C. C. 459.

6486

Interstate Commerce Commission.

No. 11365.

In the Matter of the Application for Consolidation of Express Companies.

Submitted August 18, 1920. Decided December 7, 1920.

Consolidation of the express transportation business and property devoted to that business of the Adams, American, Wells Fargo & Company, and Southern express companies into the American Railway Express Company approved and authorized.

(Headnote.)

T. B. Harrison and J. H. Mooers for American Railway Express Company and C. W. Stockton for Adams Express Company, Southern Express Company, and Wells Fargo & Company.

(Other appearances.)

Report of the Commission.

By the Commission:

By application filed March 22, 1920, as amended, we are requested to approve and authorize the consolidation of the express transportation business and the property devoted to that business of the Adams, American, Wells Fargo & Company, hereinafter referred to as the Wells Fargo and Southern express companies into the American Railway Express Company, hereinafter called applicant. The application is made under paragraph (7) of section 5 of the interstate commerce act, as amended by section 407 of the transportation act, 1920, and reading as follows:

The power and authority of the Commission to approve and authorize the consolidation of two or more carriers shall extent and apply to the consolidation of four express companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made to the Commission within thirty days after the passage of this amendatory act, and pending the decision of the Commission such consolidation shall not be dissolved.

At the beginning of the period of federal control there were seven express companies operating over the railroads of the United States, the Adams, American, Wells Fargo, Southern, Great Northern, Western, and Northern express companies. Of these, the first four named operated over approximately 92 per cent of the railroad mileage of the country, and transacted approximately 95 per cent of the express business of the country. After the government assumed control and operation of the railroads the Director General of Railroads declined to carry

out the separate contracts between the railroads and express companies under which the express business had theretofore been conducted, but advised the express companies that if they would form a single corporation he would make a contract with that corporation to conduct the express business as his agent. In June, 1918, the Adams, American, Wells Fargo, and Southern express companies, which jointly had secured by lease the express business and the property devoted to that business of the other express companies hereinbefore mentioned, entered into a contract with the Director General by which it was provided that the express companies would cause to be organized a corporation to carry on the express transportation business for the Director General. Thereupon, the American Railway Express Company was organized under the laws of Delaware and, under a contract with the Director General, took over the express business upon the railroads under federal control as agent of the Director General. The Adams, American, Wells Fargo, and Southern express companies exchanged all the property devoted by them to the express transportation business, estimated by the Director General to be of the value of $30,000,000, as of November 30, 1917, together with $3,000,000 in cash for working capital, for the stock of the American Railway Express Company. Including additions and betterments not charged to operating expenses made between the latter date and July 1, 1918, the authorized issue of capital stock of the applicant at par aggregated $34,642,109.64.

A number of protests against the approval and authorization of the consolidation, in the form of resolutions adopted by commercial organizations, letters, and telegrams, have been received by us. In most of these complaint is made that the service rendered by applicant was and is inadequate and unsatisfactory, and this at-

tributed largely to the lack of competition. In a number of others the policy of at least two of the predecessor companies with respect to the adjustment of claims which arose prior to the consolidation is criticized, and it is urged that if the consolidation is authorized suitable provision should be made to protect the rights of claimants.

* * * * * * *

It is insisted that the approval by us of the organization and its continuance in business will not destroy competition; that applicant at present competes for a large part of its business with the parcel post, which operates on all lines in the United States; that in normal times it competes for package business with fast freight lines hauling less-than-carload traffic; and that it is in direct and keen competition with motor trucks which operate over considerable distances between principal cities in general. It is further said that it is doubtful if the old companies would resume business. Officials of the Wells Fargo, Adams, and Southern express companies testified that they would advise those companies against returning to the express transportation business. The provisions of the interstate commerce act with respect to prospective consolidation of rail carriers contemplate that competition shall be preserved but do not require that competition shall be inaugurated or increased.

* * * * * * *

As previously observed, the consolidation having been accomplished, there is to-day no actual competition between express companies. Even prior to federal control and the existing consolidation, there was practically no competition so far as express transportation rates and charges were concerned, express rates being made on the

block system prescribed by us and applying alike to all express companies. While to some extent there was competition with respect to the services rendered, the economies and elimination of wasteful services resulting from the consolidation would appear to be more than sufficient to offset any advantages to the public growing out of the separate operation of the four express companies, even if, on a denial of this application, they should resume operations as such, as to which there appears to be some doubt. As to the rates and practices of the consolidated company, we may regulate and control them to the same extent as if there were separate operation.

* * * * * * *

We are not authorized under the interstate commerce act to approve the maintenance of the existing consolidation and in connection therewith to prescribe terms as to the manner in which these claims shall be handled as a condition of the continuance of the consolidation. Nor are we authorized to require the resumption of operation by the constituent companies. We are merely empowered to approve and authorize the existing consolidation.

* * * * * * *

Upon consideration of all the facts and circumstances of record we are of opinion and find that the public interest will be promoted by the consolidation. An order will be entered approving and authorizing the consolidation.

* * * * * * *

125 ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of December, A. D. 1920.

No. 11365.

In the Matter of the Application for Consolidation of Express Companies.

It appearing, That the American Railway Express Company has duly filed application for approval and authorization under paragraph (7), section 5, of the interstate commerce act as amended by section 407 of the transportation act, 1920, of the consolidation of the express transportation business and property devoted to that business of the American Express Company, The Adams Express Company, Southern Express Company, and Wells Fargo & Company, and the consolidation of said four companies so far as said business and property are concerned into the American Railway Express Company, a Delaware corporation;

It further appearing, That a full investigation of the matters and things involved has been had and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

And it further appearing, That the public interest will be promoted by said consolidation:

It is ordered, That said consolidation be, and it is hereby, approved and authorized.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(Seal)

127 "EXHIBIT No. 3-L."

(Employes' Exhibit "L".)

Photostat Copy of Record in the Files of the Interstate Commerce Commission of Agreement Between the American Railway Express Company and Agents for Participating Railroads Covering the Taking Over of the American Railway Express Company by the Participating Railroads.

Agreement.

American Railway Express Company
and
William B. Storey, Wallace W. Atterbury, Patrick E. Crowley, Carl R. Gray, Agents for Participating Railroads.

Agreement dated January ..., 1929, by and between American Railway Express Company, a corporation of the State of Delaware (hereinafter called the "Express Company"), party of the first part, and William B. Storey, Wallace W. Atterbury, Patrick E. Crowley and Carl R. Gray, (hereinafter called the "Agents") as agents for the Participating Railroads hereinafter described, and not individually, parties of the second part;

Whereas: The railroad corporations named in Exhibit "A" hereto annexed, by the execution, severally, of agreements, dated July 2, 1928, in the form of Exhibit "B" hereto annexed, have appointed the above named parties of the second part their agents for the purposes and with the powers expressed in said form of agreement. Said railroad corporations and such other railroad corporations as shall hereafter execute said form of agreement, Exhibit

"B", are herein called the "Participating Railroads". The Express Company is conducting express transportation business on the respective lines of the Participating Railroads under contracts with the Participating Railroads, severally, substantially identical in form (hereinafter called the "Amended Uniform Express Contracts"), which by their terms expire on February 28, 1929. Substituted Article XX of the Amended Uniform Express Contracts provides as follows:

"All of the contract provisions embodied herein are agreed to by both the Rail Company and the Express Company as being inseparable and interdependent, and shall take effect on March 1, 1923, and the agreement effective September 1, 1920, as hereby amended, shall continue in force until midnight on February 28, 1929.

In the event the Express Company does not continue express operations over the lines of the Rail Company after midnight on February 28, 1929, then at that time the Rail Company shall purchase from the Express Company and the Express Company shall sell to the Rail Company, at cost less the depreciation chargeable under Article V, Section 4, item (e) of this contract, all property of the Express Company used in its express operations hereunder located on the lines of the Rail Company. The Rail Company hereby confirms the depreciation rates now and heretofore used by the Express Company and said rates shall be continued to the termination of this contract subject to the provisions of said Article V, Section 4, item (o)."

The Agents have notified the Express Company that the Participating Railroads will not renew the Amended Uniform Express Contracts upon their expiration or enter into negotiations for any new contract with the Express

Company for the operation of the express transportation business on their respective railroads, and the Express Company will not continue express operations over the lines of the Rail Companies after midnight on February 28, 1929, under said substituted Article XX of the Amended Uniform Express Contracts.

Now, Therefore, the parties hereto agree as follows:

First: The Express Company agrees to sell, convey and deliver, and the Agents agree to purchase, for the considerations and on the terms hereinafter stated, the following described properties owned by the Express Company on February 28, 1929:

1. All equipment of every kind, character and description, at its book value, i. e., cost less the depreciation chargeable to and including February 28, 1929, under Article V, Section 4, item (e) of the Amended Uniform Express Contracts.

2. All buildings, whether on land owned or not owned by the Express Company, at their book value, i. e., cost less the depreciation chargeable to and including February 28, 1929, under Article V, Section 4, item (e) of the Amended Uniform Express Contracts.

3. The parcels of land set forth in the memorandum annexed hereto as Exhibit "C", at the sum of Eight million two hundred seventy thousand Dollars ($8,270,000). This item is not subject to adjustment.

4. All materials and supplies at their book value on February 28, 1929.

The foregoing properties are those which comprise the items "Real Property and Equipment" (excluding, how-

ever, an item of $46,113.18 for organization expenses, which is carried in the account, "Miscellaneous Equipment") and "Materials and Supplies" as set forth in the certified copy of the balance sheet of the Express Company as of September 30, 1928, annexed hereto as Exhibit "D", subject to such changes as shall be made in the regular course of business between said date and midnight between February 28 and March 1, 1929. The purchase price of said properties on the bases aforesaid is Thirty million three hundred thirteen thousand Dollars ($30,313,000.), subject to adjustment as hereinafter provided with reference to items 1, 2 and 4 aforesaid.

Second: On March 1, 1929, at ten o'clock in the forenoon, at the office of the Express Company, No. 65 Broadway, in the Borough of Manhattan, New York City, or at such other time and place as shall be mutually agreed upon, the Express Company will deliver to or upon the order of the Agents, and the Agents will accept, the following:

1. A bill or bills of sale of all equipment and materials and supplies within the terms of this agreement.

2. Bargain and sale deeds of conveyance with covenant against grantor's acts, to each of the parcels of real estate listed in Exhibit "C" hereto, with all buildings thereon, subject to all unpaid taxes, and subject to assessments levied after September 30, 1928, for public improvements.

3. Assignments of all leases of land, or leasehold interests in land, then held by the Express Company for purposes pertaining to the express transportation business, together with all right, title and interest of the Express Company in and to all buildings upon land held under such leases or leasehold interests and in and to any and all rights of reimbursement which the Express Company

may have for the cost of erection of buildings on leased lands.

Assignments of all leases of offices and all leases for miscellaneous purposes, held for purposes pertaining to the express transportation business.

The Express Company will diligently endeavor prior to March 1, 1929, to secure the assents of the lessors to all assignments of leases of land and of offices and other leases herein provided for, if and to the extent that such assent is required by the terms of such leases.

4. A bill or bills of sale or instrument or instruments of assignment of all right, title and interest of the Express Company in and to any other buildings then held by the Express Company for purposes pertaining to the express transportation business.

5. Assignment of the so-called financial contract and agreement now existing between the Express Company and the American Express Company, with a renewal of such contract and agreement, until February 28, 1930, to be executed by the parties thereto, subject, however, to earlier termination by either party, at its election, by at least six (6) months notice in writing given on or at any time after March 1, 1929.

6. Assignment of all contracts continuing beyond February 28, 1929, with electric railroads, stage lines and other carriers for the transportation of express matter, other than contracts in the form of the Amended Uniform Express Contracts, and of all miscellaneous contracts pertaining to the express transportation business.

Third: All bills of sale, deeds and assignments to be delivered as specified under subsection 1 to 6 of the fore-

going paragraph shall be deemed delivered and title shall pass as of midnight between February 28 and March 1, 1929, (or such other date as may be appropriate in accordance with the provisions of Article Twelfth hereof) of whatever standard of time shall obtain where the property affected is located.

Fourth: All instruments to be delivered as hereinbefore provided shall be in form satisfactory to counsel for the Agents, and to that end an examination of them shall be afforded counsel for the Agents seasonably prior to March 1, 1929.

Fifth: Upon the delivery of the instruments to be delivered as above specified, the Express Company will surrender to the Agents possession and control of all offices and operating and office organizations and operating records and accounts, pertaining to the express transportation business; but the Agents reserve the right to decline to take into service or to dismiss from service thereafter any officers or employees of the Express Company; and all books and other records and papers delivered hereunder to the Agents shall at all reasonable times be available for inspection by the Express Company.

Sixth: (1) The Agents will liquidate and settle the accounts of the Express Company, outstanding on February 28, 1929, arising out of the conduct of the express business during the Uniform Express Contract and Amended Uniform Express Contract periods, assuming and paying all liabilities, whether recorded or unrecorded, and defending or settling all claims, demands and suits growing out of such business, except as otherwise provided by paragraph (6) of this Article Sixth. To that end the Express Company will assign and transfer (and deliver when susceptible of delivery) to the Agents all contract assets and contract asset accounts, as so denominated and shown in

the column headed "Contract" on Exhibit "D" annexed hereto, as the same shall exist on February 28, 1929, including unrecorded claims and demands, and also all right, title and interest of the Express Company to recover from the contract railroad companies any excess of liabilities over assets, resulting from such liquidation, except as otherwise provided in paragraph (5) of this Article Sixth.

(2) In determining the outstanding contract obligations, all taxes, rents, insurance premiums and other contract payments, heretofore made or which may be now due or become due hereafter shall be apportioned between the Amended Uniform Contract period and the subsequent period in the same manner as the apportionment of like items was made as of the beginning of the Amended Uniform Contract period. The revenues on express traffic in transit at midnight between February 28, 1929, and March 1, 1929, on the lines operated by the Express Company prior thereto, shall not be separately ascertained for periods, but the accrued asset account for overlap revenues transferred with the other contract accounts hereunder shall be accepted as the measure of the apportionment of this item between periods.

(7) The Agents will likewise liquidate and settle the accounts of the Express Company outstanding on February 28, 1929, arising out of the conduct of the express business during the Federal Guaranty period, and the Express Company shall reimburse, or advance funds to, the Agents from time to time upon demand for all disbursements and out-of-pocket cost incurred by the Agents in connection therewith.

(8) The Agents agree to take over and liquidate the Trustee account of the Express Company for the Director

General of Railroads covering the operations of the Express Company during the Federal Control period, subject to the consent of the Director General.

Seventh: The Agents assume any and all leases and contracts pertaining to the express transportation business extending or renewed beyond February 28, 1929, or covering a period beginning after that date, including all miscellaneous contracts pertaining to the express transportation business.

Eighth: The Agents assume any and all obligations of the Express Company under its employees Pension System, to continue all pensions heretofore granted or which shall be granted prior to March 1, 1929, in due course pursuant to the rules of such system now in force, and to recognize the pension rights under said system of all officers or employees of the Express Company who shall be taken into the service of the Agents. The Express Company guarantees that the aggregate amount of pensions heretofore granted and now payable under its employees Pension System does not now exceed Eighty-five thousand dollars ($85,000) per month, and agrees that no additional pensions will be granted prior to March 1, 1929, except upon advice to and with the concurrence of the Agents.

* * * * * * * * *

Tenth: Prior to March 1, 1929, the Express Company will not make conveyances or acquisitions of property pertaining to the express transportation business, other than such as are necessary in the regular conduct of the business and in respect of which adjustment shall be made in the settlement of the accounts between the Express Company and the Agents. Leases and contracts which expire on or before February 28, 1929, essential to the conduct of the Express business as now carried on by the Ex-

press Company, may be renewed and extended beyond March 1, 1929, and necessary leases and contracts beginning thereafter may be executed, but all said leases and contracts shall be assigned to the Agents, and the Agents will indemnify the Express Company against any and all liability with respect thereto.

* * * * * * * * *

"Thirteenth: This agreemnt shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns."

135 "EXHIBIT No. 3-M."

(Empioyes' Exhibit "M".)

Submitted by The Order of Railroad Telegraphers to National Railroad Adjustment Board in the Hearing on the Question of Jurisdiction over Railway Express Agency, Inc., in the Claim of our Committee on Seaboard Air Line Railway Covered by Docket TE-247.

Sworn statement by General Chairman D. May, who served as such March, 1916, to July, 1919, and from March, 1924, to March, 1930.

Sworn statement by General Chairman W. L. Tidwell, who served as such July, 1919, to December, 1921.

Sworn statement by General Chairman B. K. Padgett, who served as such December, 1921, to March, 1924.

Sworn statement by General Chairman R. F. Thompson, who has served as such from March, 1930, continuously to date.

136 "EXHIBIT No. 3-M."

(Employes' Exhibit "M".)

To Whom It May Concern:

This is to testify that no official notice of cancellation of Express Schedule Agreement of August 1st, 1917, was ever served on me as General Chairman by the Southern Express Company, United States Railroad Administration (Director General), American Railway Express Company or Railway Express Agency or that they desired to avail themselves of the thirty-day clause of the agreement.

(Seal) D. MAY.

State of Georgia.
County of Madison.

Sworn to and subscribed before me this 28 day of January, 1936.

W. J. WHITEHEAD,
(Seal) N. P.

My commission expires Jan. 10, 1938.

137 "EXHIBIT No. 3-M."

Order of Railroad Telegraphers

S. A. L. System Division 28.

Helena, Ga., Feby. 10th, 1936.

To Whom It May Concern:

This is to certify that during my tenure of office as General Chairman of the Order of Railroad Telegraphers, Seaboard Air Line Railway System Division Number 28, that no notice of cancellation or any other notice was

served on me as General Chairman by the Southern Express Company, United States Railroad Administration (Director General), American Railway Express Company or Railway Express Agency indicating at any time or in any manner that either of those companies or administration would no longer be bound by Express Schedule Agreement of August 1st, 1917, or that they desired to avail themselves of the thirty-day clause of the agreement.

My tenure of office was July, 1919, to December, 1921.

Signed this the 10th day of February, 1936.

W. L. TIDWELL.

Witness:
JNO. S. STAUROG,
N. P. State at Large.

138 "EXHIBIT No. M-3."

State of Florida,
County of Okeechobee.

To Whom It May Concern:

Notice of cancellation or any other notice was not served on me as General Chairman by the Southern Express Company, United States Railroad Administration (Director General) or American Railway Express Company indicating at any time or in any manner that either of those companies or Administration would no longer be bound by the Express Schedule Agreement of August first, 1917, or that they desired to avail themselves of the thirty day clause of the agreement.

B. U. PADGETT.

Sworn to and subscribed before me this 11th day of February, A. D. 1936.

GOLDIE COKER (Durrance)
Notary Public, State of Florida at Large.

My Commission expires May 8, 1936.

139 "EXHIBIT No. M-3."

Georgia—Wilcox County.

To Whom It May Concern:

Personally appeared before me, an officer authorized to administer oath in the said state and county, R. F. Thompson, who being duly sworn affirms that:

He has been General Chairman of Seaboard Air Line System Division 28, the Order of Railroad Telegraphers since March 17th, 1930, and has not since that time been served with any notice of cancellation or any other notice by the Southern Express Company and or the Railway Express Agency, Inc., indicating in any manner that they would not be bound by the express schedule agreement of August 1, 1917, or that they desired to avail themselves of the thirty-day clause of the agreement.

Sworn to and subscribed before me, this the 27th day of January, 1936.

R. F. THOMPSON,
General Chairman, S. A. L. Div-28.

HENRY B. SUTTON,
Notary Public, Wilcox Co., Ga.

140 "EXHIBIT No. 3-N."

(Employes' Exhibit No. "N".)

Photostat Copies of Correspondence During Federal Control of Railroads Relating to the Payment of Express Commissions to Joint Railway-Express Agents.

"St. Louis—San Francisco Railway Company.

St. Louis, Mo.

August 2nd, 1918.

301-T.

Mr. C. G. Kelso,
519 Woodruff Bldg.,
Springfield, Mo.

Dear Sir:

Replying further to your letter of June 26th:

We recently received notice from the Regional Director announcing that the American Railway Express Company would not pay commissions on express earnings, and a few days later received another circular cancelling the previous one, advising that the payment of express commissions will be continued as in the past until arrangements can be made for the establishment of a flat salary basis for joint employees. There is nothing to be done, therefore, until further action is taken in Washington.

Yours very truly,
J. M. KURN,

A-k.

141 "EXHIBIT No. 3-N."

St. Louis—San Francisco Railway Company

St. Louis, Mo.

June 28, 1918.

Mr. C. G. Kelso,
General Chairman, O. R. R.,
519 Woodruff Building,
Springfield, Missouri.

Dear Sir:

Your letter June 26th.

Have no official advice as to abolishing express commissions. As soon as official notice received, will be very glad to meet your committee and go over matter.

Yours very truly,
J. M. KURN.

142 "EXHIBIT No. 3-N."

Frisco System Division No. 32

The Order of Railroad Telegraphers.

C. G. Kelso, General Chairman,
517 Woodruff Building,
Springfield, Mo.

June 26th, 1918.

Mr. J. M. Kurn,
Vice President,
Frisco Building,
St. Louis, Mo.

Dear Sir:

We are unofficially informed that express commissions and fixed amounts paid to employees covered by Tele-

graphers Schedule or contract with the Frisco Railway by Express Companies, for service rendered, will be discontinued July 1st.

These express commissions and fixed amounts paid to employees covered by our contract have always been taken into account when making our working contract with the Frisco Railway and if payment of these commissions and fixed amounts are to be discontinued we desire a meeting with you to revise our wage scale as follows:

Take an amount equal to the average monthly express commissions and fixed amounts paid to Frisco Railway employees positions covered by Telegraphers Schedule plus forty per-cent and spread the amount to positions covered by Telegraphers Schedule as may be mutually agreed to by yourself and our Committee.

We are willing to use the average commissions and fixed amounts paid by the Express companies in the calendar year 1917.

An early date will be appreciated.

Yours truly,

.....

General Chairman.

143

"EXHIBIT No. 4."

Railway Express Agency

Incorporated

Committee on Wages and Working Conditions
230 Park Avenue
New York.

November 22, 1935.

Mr. H. A. Johnson, Secretary Division No. 3,
National Railroad Adjustment Board,
220 South State Street,
Chicago, Illinois.

Dear Sir:

I have your letter of November 21 referring to yours of October 10, advising of the intention of the General Chairman of the Order of Railroad Telegraphers to file with your Board on or before November 9, 1935, an ex parte submission involving a claim of the General Committee of the Order of Railroad Telegraphers on the Seaboard Air Line, and setting forth three items in the matter.

Please be advised that this Company has not nor has it ever had any contract with this Organization bearing date of August 1, 1917, or any other date. Also, that this Agency has been informed that the Express Agreement referred to by the representatives of the Order of Railroad Telegraphers was one between the Southern Express Company and the Order of Railroad Telegraphers, but the Southern Express Company retired from the domestic Express Business midnight June 30, 1918. On July 1, 1918 and thereafter, the Express business on the Seaboard Air Line and all other railroads of the United States was

handled by the American Railway Express Company as Agent for the Director General of Railroads. The American Railway Express Company entered into no agreement with the Order of Railroad Telegraphers and did not formally or otherwise take over the above mentioned contract executed by the Southern Express Company, and on several occasions so stated to representatives of the Order of Railroad Telegraphers. In fact, in its operating agreement with the Director General of Railroads, no provision was made for the assumption of any contracts affecting Express commissions, but on the contrary, such operating contract provided that Express commissions be paid direct to the U. S. Railroad Administration.

The American Railway Express Company retired from the domestic Express transportation business March 1, 1929, and was succeeded by the Railway Express Agency, Inc. The Railway Express Agency did not receive from the American Railway Express Company any contracts involving the payment of Express commissions on the Seaboard Air Line or any other railway, nor did it take over any contract between the American Railway Express Company and the Order of Railroad Telegraphers involving Express commissions or any other thing whatever.

It is the position of the Railway Express Agency that the jurisdiction of the National Railroad Adjustment Board does not extend to this matter for the reasons that:

1. The authority of the Board is limited to questions arising out of contracts or agreements between the carriers and their bona fide employes. There is no contract or agreement between the Express Agency and the Order of Railroad Telegraphers or between the Agency and any of its employes relating to Express commissions, nor any dispute arising out of such.

2. Railroad employes receiving Express commissions are not bona fide employes of the Express Agency, within the definition of employes as contained in Section 1, paragraph Fifth of the Railway Labor Act. Therefore, this action is not properly brought against the Railway Express Agency, which is not the employer as specified in the Railway Labor Act, nor is the complainant an employe of the Express Agency as specified in Section 1 thereof.

For these reasons the Express Agency is demurring to this Board taking jurisdiction and at this time is making no other response.

Yours truly,
L. R. GWYN.

145 "EXHIBIT No. 5."

Brief Submitted by the Committee of the Order of Railroad Telegraphers on Seaboard Air Line Railway Representing the Joint Railway Express Agents, in the Matter of Jurisdiction of the National Railroad Adjustment Board over the Railway Express Agency, Inc., as Defendant in the Dispute Contained in Docket TE-247 Filed with the Board by the Organization.

Docket TE-247 N. R. A. B.

R. F. Thompson, Chairman of Committee, representing the jointly employed railway-express agents on Seaboard Air Line Railway, and members of The Order of Railroad Telegraphers.

The carrier, the Railway Express Agency, Inc., cited in this dispute by The Order of Railroad Telegraphers as constituted through its General Committee on the Sea-

board Air Line Railway, demurs to our claims, as set forth in our ex parte submission, on the grounds:

1. That the Express Agency has not, nor has it ever, had any contract with our organization bearing the date of August 1, 1917;

2. That the Southern Express Company, which executed the agreement of August 1, 1917, with our organization, retired from the domestic express business at midnight, June 30, 1918;

3. That the American Railway Express Company, successor to the Southern Express Company, did not formally or otherwise take over the abovementioned contract executed by the Southern Express Company, either as agent for the Director General of Railroads during Federal control or subsequent thereto;

4. That the Railway Express Agency did not receive from the American Railway Express Company any contracts involving the payment of express commissions on the Seaboard Air Line, or any other railway, between the American Railway Express Company and The Order of Railroad Telegraphers involving express commissions or any other thing whatever;

and that consequently the Railway Express Agency assumes the position that the jurisdiction of the National Railroad Adjustment Board does not extend to the subject matter of our claim in dispute; and for the further reasons;

(a) That the authority of the Board is limited to questions arising out of contracts or agreements between carriers and their bonafide employes, and

(b) That railroad employes reciving express commissions are not bonafide employes of the Railway Express Agency within the definition of employes, as contained in Section 1; Paragraph Fifth, of the Railway Labor Act, and that, therefore, this action of the organization is not properly brought against the Railway Express Agency.

The Board has decided to consider at this hearing the question of jurisdiction of the Board. We will be governed accordingly in our reply.

The carrier, the Railway Express Agency, appears to admit that the Southern Express Company executed a contract with the General Committee of The Order of Railroad Telegraphers on the Seaboard Air Line Railway as of August 1, 1917, governing the amount of commission rates paid the railway agents for handling its express business on the line of that railway, but for matter of record, we submit a copy (Employes' Exhibit "C") of the original document bearing the signatures of the operating officers of the Southern Express Company and the Chairman of the Committee, the original of which is in our possession and may be viewed, if desired.

The Express Agency contends that this contract was not taken over by the American Railway Express Company when acting as agent for the Director General of Railroads during Federal control. We contend that statement is in error, and in support of our position that the contract was taken over, we submit a copy of agreement, a public document, marked Employes' Exhibit "J", executed by the Southern Express Company with the Director General of Railroads on June 21, 1918.

An examination of the agreement entered into on June 21, 1918, between the Director General of Railroads and the four express companies, of which the Southern Ex-

press Company was one, may be referred to as some of its clauses have some bearing upon this question.

The fourth clause, on page 3 of the agreement which is attached hereto as Employes' Exhibit "J", (see Exhibit 3-J) is as follows:

"Fourth: The express companies further agree that they will, without additional compensation, assign, transfer, and turn over to the said new corporation as of July 1, 1918, any and all leases, contracts, or agreements relating to their express transportation business in the United States, except contracts for express privileges with railroads or systems of transportation now under Federal control."

And, further, clause Fifth on page 3, which is as follows:

"Fifth: Said express companies also agree that they will assent to, and, so far as they can, promote the employment by said new corporation of such of their officers, agents, and employees as may be necessary to the carrying on by it of said express transportation business aforesaid."

And clause Ninth on page 4:

"Ninth: It is the intention that the provision herein made for carrying on the express transportation business through the agency of a single corporation, shall continue in effect only during the period of Federal control, and nothing herein contained shall be construed as sanctioning any combination or merger of the properties or businesses of the express companies to last beyond that period.

"Wherefore, it is agreed that the express companies shall maintain their independent corporate existence, and that

upon the termination of Federal control, the property herein agreed to be conveyed by each of them to the new corporation (or the equivalent of such property) shall be reconveyed to it by the new corporation (back to them) at a value to be agreed upon, or in the event of disagreement to be fixed by the Interstate Commerce Commission."

These clauses of the contract are referred to for the reason that Clause Fourth refers to all contracts except those that are specifically excepted, are to be transferred to the new corporation. The contract with the Southern Express Company as of August 1, 1917, was in full force and effect at that time, and under the terms of agreement was subject to transfer to the new corporation.

The Fifth Clause indicates clearly that so far as the present employees of the Southern Express Company were concerned, that they were to continue in their employment where they were then employed. This undoubtedly would imply that they were to continue under the same conditions and agreements at that time existing. This would undoubtedly carry with it the rights and privileges which these employees of the Southern Express Company enjoyed under the contract entered into by it August 1, 1917.

Clause Ninth clearly indicates the nature of the contract of transfer and its purpose, and further, that it was only a temporary transfer, to continue during the period of Federal control. However, as we shall refer to presently, the nature of this contract and the liabilities growing out of it have been clearly established by the Courts.

We will now consider the effect of the taking over of the property of the Southern Express Company and the other express companies by the American Railway Express Company, as decided by the Courts of the various

States and as approved by the Supreme Court of the United States (Citing and discussing authorities.)

The holding of the decisions which we have referred to clearly indicates that the transfer of the property to the American Railway Express Company amounted to nothing more than a continuation of the business of the old companies by one company, the new company taking over and assuming all of the debts and liabilities of the old companies. One of the liabilities existing at the time the Southern Express Company transferred its assets to the American Railway Express Company was the contract which it had with its employees who are members of The Order of Railroad Telegraphers, and undoubtedly under those decisions that contract continued in full force and effect, and as hereinafter set out, was recognized by the American Railway Express Company as binding upon it.

It becomes necessary to trace still further the history of the American Railway Express Company to the present Railway Express Agency, Inc. It appears that during the period of Federal control or shortly after the termination of Federal control, contracts known as the "Uniform Contract for Express Operations Over Rail Lines" and "Amended Uniform Contract for Express Operations Over Rail Lines", were entered into. We shall not take the time or space to refer to these contracts, as their provisions were finally consummated in the transfer of the property by the American Railway Express Company to agents of certain railroad companies called Participating Railroads. (See Employes' Exhibit "L") It appears that under date of January 23, 1929, the American Railway Express Company entered into an agreement with William B. Storey, Wallace W. Atterbury, Patrick E. Crowley, and Carl R. Gray, by which it was agreed that all of the assets that the American Railway Express Company had at that time were to be turned over to these agents.

The history of this transfer is fully set out in Volume 150 Interstate Commerce Commission reports at page 423 and particularly beginning at page 428 of said volume, where the Commissioner who wrote the opinion, set out in narrative form the facts covering the contract by which the American Railway Express Company transferred to the four agents above referred to, and these agents in turn formed a corporation under the laws of Delaware, and the corporation took over all of the assets that were transferred by the American Railway Express Company to the agents. The facts covering that transfer and the incorporation of the Railway Express Agency, Inc., are set out by the Commissioner, who wrote the opinion in the matter submitted to the Interstate Commerce Commission found in Volume 150 beginning at page 423. The narrative following begins at page 428 of said report: (Quotation from case.)

On page 427 of Volume 150 of the same report of the Interstate Commerce Commission, this information is given with reference to the incorporation of the Railway Express Agency, Inc.: (Quotation from case.)

From the above facts, as narrated, which we believe cover correctly what took place when it became necessary for the American Railway Express Company to turn over the property which it had to these agents, and the agents in turn transferred what they received to the Railway Express Agency, Inc., brings the property, assets and liabilities of the American Railway Express Company into the hands of the Railway Express Agency, Inc. We have set out quite fully hereinabove the decisions of State Courts approved by the United States Court, which we believe proves conclusively that while the American Railway Express Company took over from the four express companies —the Southern Express Company being one—the assets of those companies, that it took the existing liabilities of

those companies. We believe the decisions which we have quoted fully bear that out. At the time the American Railway Express Company took over the assets of the Southern Express Company, the contract of August 1, 1917, was in existence and was one of the liabilities of the Southern Express Company. Whatever rights the employees had under that contract were undoubtedly preserved and whatever liabilities there were so far as the Southern Express Company was concerned, were preserved and passed into the hands of the American Railway Express Company. The transfer of the American Railway Express Company to the agents, and to the Railway Express Agency, Inc., was merely a transfer of all of the assets which the American Railway Express Company held at that time and the above facts as gathered from the contracts enumerated in the quotation from 150 I. C. C. 423, it clearly shows that all liabilities, whether recorded or unrecorded, were assumed by the agents and the agents were merely a party through whom the same assets and liabilities were transferred to the Railway Express Agency, Inc.

We have referred to the recitation of the facts in Report 150 I. C. C. 423, covering the divesting of itself of assets and liabilities by the American Railway Express Company and the receipt of said assets and liabilities by the Railway Express Agency, Inc., as it is set out in compact form and relieves us of the necessity of taking the several contracts in full and making them exhibits here. Report 150 I. C. C. 423 is a public document and the report is available to anyone who may desire to examine the same.

It is our belief the facts which we have outlined and detailed clearly show that the contract of August 1, 1917, being a liability of the Southern Express Company at that time, has been transmitted and went along with the as-

sets which the Southern Express Company had at the time it turned those assets over to the American Railway Express Company and through the transfer of the American Railway Express Company was transmitted unimpaired to the Railway Express Agency, Inc., and is still in force and effect, the contract at no time having been terminated by the parties thereto or their successors.

In support of our statement that there is no showing that the contract has ever been changed or satisfied in accordance with the terms of the contract since executed in August, 1917, we submit herewith Employes' Exhibit "M", consisting of sworn statements by D. May, who signed the contract as the representative of the employes, and by the three representatives who have succeeded him consecutively to date, testifying that no notice of cancellation or any other notice has been served on them by the Southern Express Company, the Director General of Railroads, the American Railway Express Company or the Railway Express Agency, indicating at any time or in any manner that they would no longer be bound by the express contract of August 1, 1917, or that they desired to avail themselves of the thirty-day clause of the contract.

As to the contention of the Railway Express Agency, Inc., that railroad employes receiving commissions are not bona fide employes of the express agency:

We submit that this question is only indirectly involved in the case in dispute. In the instant case, the Seaboard Air Line Railway was agreeable to its agents choosing representation for the purpose of entering into an agreement with the Southern Express Company, through collective bargaining, to govern the matter of commission rates and allowances to be paid the employes for handling the express transportation business of the Southern Express Company at their stations. The agreement was, therefore,

entered into by the Southern Express Company with the joint railway-express agents as employes of the Southern Express Company, and agreement so states in the preamble, which reads:

"The following rules and rates of pay will govern the Southern Express Agents, who are jointly employed as Railway and Express Agents on the Seaboard Air Line Railway."

On this point we may cite, as an indication of the leaning of the Railway Labor Act, amended, in that direction, the definition of "What is an employe?" under the Railway Labor Act, amended, as announced by the National Mediation Board in its First Annual Report for the fiscal year ended June 30, 1935, in relation to its determination of the status of "Red Caps" at stations. The Board found that while these persons are not ordinarily paid by the carriers, the men are hired, disciplined, discharged and given free transportation by officers of the carrier; it ruled that the red caps are covered by the definition of an employe as given by the Act, and has accordingly assumed jurisdiction to investigate representation disputes among them. Railroad station agents who also serve as agents for the express agency must be acceptable for bond by the Railway Express Agency, they must comply with the operating rules of the express agency, and if their personal record is, or becomes, unsatisfactory to the express agency they are not so employed or are discharged from the position of express agent which oftimes results in their removal or dismissal by the rail carrier, or in the event of express shortage the bond of the express agency is canceled and they are removed from employment of the express agency, which record stands against their bonded employment by other carriers and by the express agency in particular. Because of this condition of joint employment, and par-

ticularly in the matter of the agreement of August 1, 1917, we contend that the agents who are employed by the express agency as well as by the rail company are sufficiently employed by the express company to be covered by the definition of an employe of the express company as given by the Railway Labor Act, amended.

To summarize: We have shown that the contract of August 1, 1917, executed by the Southern Express Company with the committee of The Order of Railroad Telegraphers, representing the jointly employed agents, is a continuing contract which has never been satisfied, terminated or modified in any manner by either party since executed on August 1, 1917, that the contract and its liabilities were taken over by each succeeding agent and express company, the Director General of Railroads, the American Railway Express Company as the agent for the Director General of Railroads, the American Railway Express Company upon the termination of Federal control of railroads, the Committee for the Participating Railroads which took over the American Railway Express Company and turned same over to the Railway Express Agency, Inc., which Agency the railroads created as their agent to conduct the express transportation business on the lines of the participating railroads, including the Seaboard Air Line Railway, and that, therefore, the Railway Express Agency, Inc., did take over the contract of August 1, 1917, and is legally obligated under the terms of the contract, and did assume its liabilities.

Whereas, the Railway Express Agency, Inc., being legally obligated under the terms of the contract of August 1, 1917, and did legally assume the liabilities of the contract, we contend that the Railway Express Agency, Inc., is the proper party to be cited by The Order of Railroad Telegraphers in this dispute upon its reference to the National Railroad Adjustment Board in accordance with the pro-

visions of the Railway Labor Act, amended, and that the Board has jurisdiction to hear and decide the dispute as set up by the organization.

.....

Chairman, Committee of The Order of Railroad Telegraphers on Seaboard Air Line Railway, representing the jointly employed railway and express agents.

155 "EXHIBIT No. 6."

Before the National Railroad Adjustment Board Division 3.

Order of Railroad Telegraphers, Complainant,
vs. Docket T. E. 247.
Railway Express Agency, Incorporated, Defendant.

Railway Express Agency, Incorporated Memorandum of Facts and Argument on Question of Board's Jurisdiction.

This proceeding involves a complaint filed by The Order of Railroad Telegraphers against Railway Express Agency, Inc., growing out of an alleged reduction in commissions paid to railroad agents, who handle the express business of the Express Agency on a commission basis, in pursuance of provisions of contracts existing between Railway Express Agency and the various railroads over which it operates.

The position of Railway Express Agency is that this Board has no jurisdiction of this complaint for the reasons:

1. That the members of the complainant's organization are not employes of Railway Express Agency, and that Railway Express Agency is not their employer, within the terms and provisions of the Railway Labor Act, under which this Board has been appointed and from which it derives its jurisdiction; and

2. Even if the members of complainant's organization were employes, within the provisions of the Railway Labor Act, the complainant herein has no contract with Railway Express Agency, and, therefore, there can be no violation thereof which would form the basis of a dispute within the provisions of Sec. 3 (i) of the Railway Labor Act, in which the jurisdiction of this Board is prescribed.

I.

The present Railway Labor Act (Public No. 442-73D Congress) is defined in its title to be An Act to amend the Railway Labor Act approved May 20, 1926, and to provide "for the prompt disposition of disputes between carriers and their employees." Section 1 "Fifth" defines the term "employee" as used therein, to include "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission * * *." This definition of the term "employee", and the Act, taken as a whole, clearly show that it is the intent to regulate the relations between carriers and their employees who bear the ordinary and usual relationship of master and servant.

The purposes of the Act, as set forth in Section 2, being the avoidance of any interruption of commerce; the forbidding of any limitation of the right of employees to join a labor organization; the provision for the prompt and

orderly settlement of all disputes concerning rates of pay, rules and working conditions, and for the prompt and orderly settlement of disputes growing out of grievances, or out of the interpretation or application of agreements covering rates of pay, rules and working conditions, and the "General Duties"—set forth in the same section—requiring all carriers, their officers, agents, and employees, to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, etc., definitely and positively establish that the field to be covered is solely that of master and servant.

Railroad agents who handle express business on a commission basis are not employees of the Express Agency; Railway Express Agency utilizes the services of these railroad agents by the authority and permission of their employer, the Railroad Company, in pursuance of provisions in the contracts existing between the Railway Express Agency and the various railroads. Article XI, Sec. 1 of the Express Operations Agreement, which is in effect between Railway Express Agency and the Seaboard Air Line Railway Company, and the Receivers thereof, provides that:

"The Express Company may arrange with the Rail Company for station and train employees of the Rail Company to act as agents and express messengers of the Express Company and to handle express at railroad stations, subject to the rules of the Express Company, * * *".

The services rendered by the railroad agents in the handling of the express business are in addition to those they perform for their employer, the railroad company. The relationship existing between such agents and the Express Agency is not that of master and servant; the Express Agency does not hire them; does not fire them; does not promote them; does not discipline them, and has

no authority over the rules and working conditions applicable to them, those rules and working conditions being the subject of agreement between the agents and their employer, the railroad Company. Railroad agents so engaged never have been accepted by or considered as employees of the Express Agency. The rules governing the hours of service and working conditions of employees of Railway Express Agency specifically provide that the employees affected thereby shall be bona fide salaried employees of Railway Express Agency. The various agreements in effect between the Express Agency and the Labor Organizations similarly cover only salaried employees, and Railway Express Agency has not and never has had any agreement with railroad agents engaged by it on a commission basis, or any organization representing it concerning wages, rules and working conditions. Such railroad agents have not been and are not covered by surety bonds applicable to employees of the Express Agency, and they have not been and are not bonded as employees of the Express Agency. There may have been instances in which surety bonds have been taken out covering such railroad agents, but not as employees of the Express Agency, but as persons who have custody and control of funds of the Express Agency, as contractors, and the bonds have been secured in the same manner as always has been done by express companies with respect to draymen, independent contractors, or others, who may have custody of funds of the Express Agency. Such railroad agents do not come within the Agency's Pension Plan; they have not been included in the various general increases and decreases in the wages of its employees, or of American Railway Express Company, its predecessor and they have not been and are not included as employees in the reports of the Express Companies to the Interstate Commerce Commission. Moreover, the agents themselves have no choice in the matter of rendering such services.

In these circumstances there seems to be no escape from the conclusion that the members of the complainant's organization are not employees of Railway Express Agency, within the terms and provisions of the Railway Labor Act, and, accordingly, this Board has no jurisdiction in the matter, and the complaint should be dismissed.

II.

The jurisdiction of this Board is prescribed in Sec. 3 (i) of the Railway Labor Act to be disputes between an employee, or a group of employees, and a carrier, or carriers, growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions.

The complainant does not contend that any agreement has been executed between it and Railway Express Agency, but rests its charge that commissions have been reduced in violation of an agreement on the theory that Railway Express Agency is bound as the successor of American Railway Express Company which, in turn, it is claimed, was bound as the successor of Southern Express Company, party to an agreement August 18, 1917, (Complainant's Exhibit No. "C"). That agreement is one between Southern Express Company and Joint Express and Railroad Agents on the Seaboard Air Line Railway, and provides a scale of commissions for the handling of express business. The agreement was executed respectively "For The Joint Agents" and for Southern Express Company. The Order of Railroad Telegraphers is not a party thereto, and its name is not contained therein. Thus it appears on the face of the agreement on which complainant relies, that it is not a party thereto, that it was not bound thereby, and obviously it cannot benefit by reason thereof. There is on principle better settled at common law than that an action on a contract, either express or

implied, must be brought in the name of the party in whom the legal interest in such contract is vested. (13 Corpus Juris, 701.)

The complainant's presentation suggests the idea that "D. May", who executed the contract "For The Joint Agents" did so as the representative of complainant's organization, but to permit such inference, or to admit any evidence, whereby it would appear that the contract was executed by "D. May" in any capacity other than is shown on the face of the contract would be to allow the introduction of parole evidence tending to contradict or vary the terms of a written contract which is contrary to an elementary principle of law. The contract must stand as is; it is a contract between the Joint Agents and the Southern Express Company and not between The Order of Railroad Telegraphers and the Southern Express Company, and the complainant, The Order of Railroad Telegraphers, not being a party thereto may not rely thereon or benefit thereby, and may not maintain a proceeding either in Court or before this Board based upon such contract.

Railway Express Agency is not bound by such contract. The Southern Express Company, party to the agreement of August 18, 1917, ceased to do an express transportation business on June 30, 1918, and has not since conducted such business. As this Board will recall the Government took the railroads under Federal Control on December 28, 1917, and the Director General of Railroads thereafter declined to continue in effect the various contracts which the Express Companies had with the Railroad Companies for the carrying on of the express transportation business, as is shown in Memorandum of Agreement between the United States and the Express Companies, dated June 21, 1918, copy of which is hereto attached, and made a part hereof, as Railway Express Agency's Exhibit No. "1".

(Same as Exhibit 3-J hereof except that that Exhibit, 3-J, is not complete in that the exhibit therein referred to in the sixth paragraph was omitted. It is now supplied and follows this "memorandum" and marked "Exhibit A.") That Memorandum of Agreement further shows that the Director General had concluded that the express transportation business could be most efficiently carried on through the agency of a single corporation which should act as the sole agent of the Government in conducting said business, and it was provided that the several contracts of the Express Companies with the Railroad Companies, taken over by the Government under Federal control, should be canceled and annulled from and after July 1, 1918, and that the Express Companies, namely, the Adams Express Company, American Express Company, Southern Express Company and Wells Fargo & Company, should cause to be organized a corporation for the purpose of carrying on for the Director General the express transportation business upon the railroads and systems of transportation under Federal control; and the Director General of Railroads agreed that upon the organization of the said corporation he would enter into a contract with said corporation upon the terms and conditions set forth in Exhibit "A", attached thereto, and made a part thereof. Said Exhibit "A", being the agreement between the Director General of Railroads and the American Railway Express Company, was executed on June 26, 1918, between the Director General and the American Railway Express Company, and provided for the future conduct of the express transportation business upon the railroads and systems of transportation under Federal control and became effective on July 1, 1918, and continued in effect during the period of Federal Control.

That contract included the provision customary in contracts between railroad companies and express companies, authorizing the express company to employ such em-

ployees of the Director General, or agents of the Railroads, upon such terms as might be agreed upon from time to time by the Director General and the Express Company (Sec. 15, p. 12); but subject to the condition that "the Express Company shall pay to the Director General the usual commissions heretofore paid upon express transportation business at stations where such station agents are joint agents as its share of the agents' compensation."

By subsequent understanding with the Director General the American Railway Express Company did in fact pay those commissions directly to the agents, but it is to be observed that this was not by virtue of, or in accordance with any agreement between the railroad agents and the Express Company, but solely by specific agreement with the Director General of Railroads.

The American Railway Express Company never adopted the contract which the Southern Express Company had made in June, 1917, with the Joint Railroad Agents; it could not lawfully have done so. Its contract with the Director General of Railroads specifically provided for the payment of express commissions to the Director General; the amount of such commissions was determined by such contract. It is true the commissions were continued on the same basis previously in effect, but that was in accordance with the provision in the contract between the Director General and the American Railway Express Company, and we repeat was not in consequence of, or dependent upon, any contract, agreement or understanding between the American Railway Express Company and the joint railroad agents, or The Order of Railroad Telegraphers.

Complainant's submission refers to the fourth clause of the Memorandum of Agreement between the United States

and the Express Companies, Railway Express Agency's Exhibit No. 1, page 3, in which it is provided that:

"The Express Companies further agree that they will without additional compensation assign, transfer, and turn over to the said new corporation as of July 1, 1918, any and all leases, contracts, or agreements relating to their express transportation business in the United States, except contracts for express privileges with railroads or systems of transportation now under Federal control."

We have no quarrel with that statement, but in view of the provision in the contract with the Director General of Railroads, requiring the payment of express commissions due to joint railroad agents to the Director General, there was no occasion for an assignment of the contract between the Joint Agents and the Southern Express Company, such assignment would have been ineffective, and, in fact, no such assignment of such contract was ever executed by the Southern Express Company to the American Railway Express Company.

The contract of the Joint Agents with the Southern Express Company was not assigned to the American Railway Express Company at the time when American Railway Express Company began to conduct the express transportation business on July 1, 1918, or at any time thereafter; that contract never was accepted or adopted by the American Railway Express Company, and no contract ever was made between the Joint Agents and the American Railway Express Company with respect to the payment of commissions for the handling of express business, and no such contract ever was entered into between the complainant and the American Railway Express Company and no such contract ever has been executed by Railway Express Agency.

The American Railway Express Company never assumed the contract between the joint agents and the Southern Express Company, and it steadily, consistently, continuously and repeatedly refused to do so, and the complainant's submission herein admits that as early as September, 1923, Mr. L. R. Gwyn, Chairman of the Committee on Wages and Working Conditions of the American Railway Express Company, advised the complainant by a letter that he could not properly deal with its organization as its members were not employees of the Express Agency, within the meaning of the Transportation Act of 1920, and that he had no knowledge that his Company had ever made any agreement with complainant's organization.

The complainant's brief urges, at some length, that the contract between the Joint Agents and the Southern Express Company was taken over by the American Railway Express Company as one of the debts or liabilities of the old Express Company, and in support of that position cites a number of decisions in which the Courts held the American Railway Express Company liable for pre-existing debts of the old express companies. Complainant frankly admits that the decisions of the Courts were not unanimous in this respect, but cites only cases sustaining its viewpoint and omits reference to the cases holding to the contrary. (Citing and discussing cases.)

Complainant seeks to charge the American Railway Express Company with the obligation of continuing in effect for the future a contract which existed between the Joint Agents and the Southern Express Company. In the absence of an assignment of such contract by the Southern Express Company to the American Railway Express Company, and the acceptance of such contract by reason thereof, American Railway Express Company was not subject to and not bound by the contract between the

Joint Agents and the Southern Express Company. (Citing and discussing cases.)

We repeat that Southern Express Company never assigned to the American Railway Express Company, and the American Railway Express Company never accepted the contract between the Joint Agents and the Southern Express Company of August, 1917, and whatever may have been the rule with respect to the responsibility of the American Railway Express Company for pre-existing debts of the old Express Company, and we think there was no such liability, there was in no event any liability on the part of the American Railway Express Company for continuing in effect the contract between the Joint Agents and the Southern Express Company, and, on the contrary, by reason of the specific provision in the contract between it and the Director General of Railroads (Railway Express Agency's Exhibit No. 1), it would have been impossible for it to do so. The American Railway Express Company had the right to avail itself of the services of the Railroad Agents only by virtue of the provisions of that contract, and only upon payment of the commissions to the Director General.

On September 1, 1920, following the so-called "Guaranty" Period, the American Railway Express Company began the conduct of the express business on all lines of railroad in the United States (except the Southern Railway and its subsidiaries) under a contract known and described as "Uniform Contract for Express Operations Over Rail Lines", which continued in effect until March 1, 1923, when the so-called "Amended Uniform Contract for Express Operations Over Rail Lines" became effective, and continued in effect until the American Railway Express Company ceased to carry on the express transportation business on February 28, 1929.

The Uniform Contract for Express Operations provided in Article XI, Sec. 1, that:

"The Express Company may from time to time employ station and train employes of the Rail Company to act as agents and express messengers of the Express Company, subject to the rules of the Express Company; and the Rail Company may in like manner employ the agents and express messengers of the Express Company to act as station and train employes of the Rail Company, subject to the rules of the Rail Company, by and with the approval of the original or primary employer of such employes and upon such terms as may be agreed upon by the two companies, and provided that such additional employment does not interfere with the full and prompt discharge of their duties to the original or primary employer."

Article XI of the Amended Uniform Contract is substantially similar. Thus it appears that during the entire period of private operation by the American Railway Express Company, its right to avail itself of the services of the Railroad Agents arose out of and was dependent upon the provisions of the contract between the Railroad Companies and the American Railway Express Company.

The American Railway Express Company ceased to conduct the express transportation business on February 28, 1929, at which time all formal contracts in existence were assigned by the American Railway Express Company by specific agreement in which the three parties concerned participated. This is specifically true of labor agreements, all of which were by formal agreement relinquished by the American Railway Express Company, accepted by Railway Express Agency, and by and with the consent of the particular Labor Organization involved, which was joined as the third party to each of such agreements. As stated above, the contract of the Joint Agents with the Southern

Express Company had not been accepted or adopted by the American Railway Express Company, and there was no contract between the complainant and the American Railway Express Company, and there was no assignment by the American Railway Express Company of any contract with the Joint Agents, and no acceptance by the Railway Express Agency of any such contract.

The Express Operations Agreement between the Railroad Companies and Railway Express Agency, Inc., which became effective March 1, 1929, contains the same provision as quoted above with respect to the right of the Agency to avail itself of the services of Railroad Agents so that the right of the Railway Express Agency to avail itself of the services of Railroad Agents grows out of and is wholly dependent upon the provisions of its contract with the rail carriers over which it operates.

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CONCLUSION.

The members of the complainant's organization are not employes within the meaning of the Railway Labor Act, and Railway Express Agency is not their Employer within the terms thereof; complainant's organization has no contract with Railway Express Agency as charged by it, out of which a dispute might arise over which this Board would have jurisdiction; accordingly, this Board is without jurisdiction in this proceeding and it should be dismissed.

Respectfully submitted,

RAILWAY EXPRESS AGENCY,
INCORPORATED,
By ALBERT M. HARTUNG,
Attorney.

230 Park Avenue,
New York, N. Y.

Dated, March 5, 1936.

167 "EXHIBIT A."

This Agreement, made this 26th day of June, 1918, between William G. McAdoo, Director General of Railroads, hereinafter called the Director General, acting on behalf of the United States and the President, under the powers conferred on him by proclamations of the President dated December 26, 1917, and March 29, 1918, and the American Railway Express Company, hereinafter referred to as the Express Company.

Witnesseth:

* * * * * * * * *

I.

That in the interest of greater efficiency in express service and effecting economies in operating expenses of both the railroads under Federal control and the Express Company the Director General hereby employs the Express Company as the sole agent of the Government under the supervision of the Director General of Railroads to conduct the express transportation business upon all lines of railroad under Federal control and upon such other systems of transportation or parts thereof as in the judgment of the Director General it may be necessary or desirable to include.

II.

This contract shall take effect on July 1, 1918, and shall continue during the full period of Federal control as that period is limited by section 14 of "An Act to Provide for the Operation of Transportation Systems while under Federal Control, for the Just Compensation of Their Owners, and for Other Purposes," approved March 21, 1918.

III.

Said express transportation business shall be conducted under such rates, charges, classifications, regulations, and practices as are now or may hereafter be lawfully established. The Director General shall take all steps lawfully necessary to make any change in such rates, charges, classifications, regulations, and practices. The Express Company shall propose no reduction in rates or charges without the prior approval of such reduction by the Director General. The Express Company shall solicit no express shipments disapproved by the Director General.

IV.

The Director General shall furnish adequate and suitable space in cars properly equipped, heated, lighted, and lettered American Railway Express Company of the kind customarily furnished by railroad companies for the use of express companies on such passenger, mail and express trains as may be designated from time to time by the Director General over each of the lines of railroad covered by this contract for the transportation and proper handling en route of all express matter tendered by the Express Company at any station at which said trains make regular stops and shall carry such express matter and the safes, packing trunks, supplies, and equipment of the Express Company, together with the messengers, helpers, and guards of the Express Company necessary for the handling and protection of such express matter to destination or the proper transfer points on said railroads. The Director General shall, so far as it can conveniently be done without interfering with his business, permit the Express Company to use a portion of station buildings on the lines covered by this agreement without charge therefor for the

reception, loading and unloading, safe-keeping, and delivery of express matter carried under this agreement. Where special services or facilities have been furnished upon payments by the express companies in addition to the percentage of gross earnings both parties hereto shall have the benefit of such arrangements until otherwise determined by the Director General or by the Express Company after notice and hearing. The movement of express shall be under the control of the Director General at all times and transported over such lines of railroad and on such trains as he may direct in the interest of economy in car service by utilizing avilable space and with proper regard for the necessity of prompt movement.

V.

Said Express Company shall use its teams, property, offices, and other facilities, and its agents and employees in operating an express transportation business on all the lines of railroad under Federal control, and upon such other systems of transportation, or parts thereof, as in the judgment of the Director General it may be necessary or desirable to include; and in the conduct of said business will exert itself in all proper ways to make said business satisfactory to the public and to the Director General. All contracts between the Express Company and railroads and systems of transportation not under Federal control shall be subject to the approval of the Director General.

* * * * * * *

VIII.

From the gross revenue earned on the transportation by the Express Company of all the express traffic on all lines under Federal control covered by this contract, under such

rates, charges, and classifications as shall be in force, it shall pay to the Director General ..... per cent.

* * * * * * * *

It is the understanding and agreement of the parties that the "contract income for division" is not the income or property of the Express Company but is a fund resulting from the terms of this agreement in which the Director General and the Express Company have a mutual interest. The Express Company has no right to any portion of this fund except that which it finally retains under the terms of this agreement and which is the compensation paid it by the Director General for the performance of its service as the agent of the Director General in the transaction of this express business.

* * * * * * *

IX.

The Express Company shall, within sixty (60) days after the end of each calendar month, pay to the Director General a sum of money equivalent as nearly as may be to the percentage of gross revenues earned in such month provided for in the first paragraph of Section VIII.

Within ninety (90) days after the end of each calendar year or the termination of Federal control said Express Company shall render to the Director General a statement in such form and detail as he shall require, showing the results of operation of said Express Company under this contract in a year, or part thereof, determined as hereinbefore provided, and within ten (10) days after the rendition of said statement, shall pay to the Director General whatever sum shall be due to him under this contract.

X.

The salaries paid by the Express Company to its officers shall be reasonable. All salaries in excess of $10,000 a year shall be reported to the Director General. If he shall determine that any such salary is unreasonable and shall notify the Express Company in writing the maximum salary which he regards as reasonable, any amount in excess of such maximum salary so fixed shall be paid to such officer for salary after the giving of such notice shall be excluded from any accounts of the Express Company used in determining the contract income for division.

* * * * * * * *

XV.

The Director General may employ any of the employees of the Express Company upon such reasonable terms as shall be agreed upon between the parties, and the Express Company may employ such employees of the Director General or agents of the railroads, and upon such terms as may be agreed upon from time to time by the Director General and the Express Company. Where station agents of the Director General or of the railroad are employed by the Express Company, the Director General shall pay such agents the entire compensation for their services to the Director General, the railroads, and the Express Company, and no payment shall be made direct by the Express Company to any such agent whose services may be so furnished by the Director General. The Express Company shall pay to the Director General the usual commissions heretofore paid upon express transportation business at stations where such station agents are joint agents as its share of the agent's compensation.

* * * * * * * *

XX.

The Express Company will take over and continue the payment of pensions to former employees of the several express companies, which employees have heretofore been pensioned under their rules, but no such pension shall exceed One Hundred and Twenty-five ($125.00) Dollars per month. The officers and employees of the several express companies who may be employed by the Express Company shall retain the same rights to pension from said new corporation as they have at the time of change in employment. The plan and pension rules of the Express Company shall be submitted to the Director General and if disapproved by him in any particular shall not become effective until so modified as to meet his approval; the sums paid on account of such pensions shall be charged to operating expenses.

172 EXECUTION.

In witness whereof these presents in duplicate originals have, on the day and year first above written, been duly signed and delivered by William G. McAdoo, Director General of Railroads, and duly signed, sealed, and delivered by the American Railway Express Company, by George C. Taylor, its president, thereto duly authorized by a vote of the directors of the company at a meeting duly called and held on June 26, 1918, certificate of which authorization, duly attested by the company's secretary, is hereto attached.

WILLIAM G. McADOO,
Director General of Railroads.
By WALKER D. HINES,
Assistant Director General.
AMERICAN RAILWAY EXPRESS COMPANY,
By GEORGE C. TAYLOR,
Its President.

Attest:
F. P. SMALL,
Secretary.

173 "EXHIBIT No. 7".

Before the National Railroad Adjustment Board
Division Three.

Parties to the dispute:

The Order of Railroad Telegraphers,
versus In Docket TE-247.
Railway Express Agency, Incorporated.

Surrebuttal of The Order of Railroad Telegraphers in Docket TE-247 in the question of the Board's jurisdiction in this docket, as raised by the Railway Express Agency, Incorporated.

The carrier states as its position that this Board has no jurisdiction in the claim of The Order of Railroad Telegraphers involving its liability on two points, namely,

First: That the members of our organization concerned in the dispute are not employees of the Railway Express Agency, Incorporated, as the term "employees" is used in the Railway Labor Act, amended, and

Second: That even if they were employees, the Railway Express Agency, Incorporated, has no contract with the complainant, and that, therefore, there can be no violation of a contract to form the basis of a dispute over which this Board would be authorized to take jurisdiction.

As To The First:

(Omitted as not now pertinent or material in view of appellant's second amendment.)

As To Organization Representation:

The employees involved in this dispute, who are the agents for the Railway Express Company on the Seaboard Air Line Railway, entered into a signed contract with the Southern Express Company as of August 1st, 1917, governing their working conditions, commissions and allowance rates of pay, by collective bargaining through the medium of a Committee headed by a General Chairman, all of whom were, and are, regularly elected in accordance with the laws of the organization of their choosing. The organization thus chosen by these employees was, and is, The Order of Railroad Telegraphers, an unincorporated organization, with headquarters located at St. Louis, Missouri.

As provided by its laws, a Subordinate Division of the Organization, known as the Seaboard Air Line System Division No. 28, was chartered by the Grand Division of The Order of Railroad Telegraphers as of December 5th, 1901, with jurisdiction over the carrier industrial interests of all its members on the Seaboard Air Line Railway. The officers of Division No. 28, consist of a Local Chairman for each operating division of the Seaboard Air Line Railway, who are elected for a three year term by vote of the members on the respective districts, in accordance with the laws of the Order, and these local officers elect a General Chairman for the same period of office. The General Chairman is authorized by the Committee to enter into schedule contracts with the rail carrier, relating to the railroad service employment of the members, and with the Express Company relating to express service employment of the same members. On August 1st, 1917, Dr. D. May, was the duly elected General Chairman of the Organization on the Seaboard Air Line Railway, and it was he who entered into the Agreement with the Southern Express Company in behalf of our members employed as express agents at railroad stations on the Seaboard Air Line Rail-

way, governing their working conditions and rates of pay as such. It is this Contract Agreement which is involved in this proceeding. Since this document was executed on August 1st, 1917, Mr. May has been regularly succeeded by others in the capacity of General Chairman, and "Employees' Exhibit 'M'" sets forth each and all of them in consecutive order to the present date, all of whom were elected to that position strictly in conformity with the laws of the Organization. Thus, it will be understood, that Mr. D. May, who signed the contract in behalf of the express agents, and all of his successors, were acting as General Chairman of The Order of Railroad Telegraphers on the Seaboard Air Line Railway, by means of selection by vote of the members of The Order of Railroad Telegraphers, and by no one else, or by any other method or process. Mr. May, and his successors, as the representatives of the express agents, were therefore serving as the representative of the choice of the express agents through the organization of their choosing—The Order of Railroad Telegraphers—which method of choosing is their lawful right as established by Section 2, Fourth, of the Railway Labor Act, amended. This status is in no wise changed with the passing of time or the adoption of Federal Laws—that is, The Order of Railroad Telegraphers was chosen by these express agents as their lawful representative organization, and their representatives are selected in accord with the laws of that organization, and is now lawfully established. Therefore, this organization as constituted on the Seaboard Air Line Railway, has the continued right to collectively represent these employees in all matters affecting their carrier industrial employment whether it be related to their employment by the Express Company, or related to their employment by the railroad company, and had that right, without any exception, to appear before the Southern Express Company, the Division of Labor of the United States Railroad Administration during Federal Control, the American Railway Express

Company, and the United States Railroad Labor Board, in matters affecting its members as express agents. These employees continuously authorize The Order of Railroad Telegraphers through its General Committee, of which D. May was its Chairman, to act for them in these matters and in the matter of the Contract of August 1st, 1917.

Status of Contract.

The Contract of August 1st, 1917, governing certain working conditions and commission and allowance rates of pay to express agents and other employees at the railroad stations and transfer points on the Seaboard Air Line Railway, negotiated with the Southern Express Company by their duly elected Committee and by D. May as Chairman, was in effect as a continuing contract at the time Express Company was taken over by the United States Government through the Director General of Railroads. We have shown in our oral argument that in the contract between the Director General and the Southern Express Company that effective as of July 1st, 1918, the Southern Express Company agreed to turn over to the American Railway Express Company, the operating company of all express companies during Federal Control, all Contracts and Agreements relating to their express transporation business on the Seaboard Air Line Railway. The contract of the express agents on the Seaboard Air Line Railway dated August 1st, 1917, was one of these contracts as it had not been terminated or modified in any manner, and this contract existed in the possession of the American Railway Express Company with the later consolidation of the Southern Express Company into the American Railway Express Company.

The Railway Express Agency lays stress on that part of a contract executed by the Director General with the American Railway Express Company employing it as the

sole agent of the Government to conduct the express transportation business on the Seaboard Air Line Railway, wherein it was agreed that:

"The Express Company shall pay to the Director General the usual commissions heretofore paid upon express transportation business at stations where such station agents are joint agents as its share of the agent's compensation."

as vitiating the contract of the express agents on the Seaboard Air Line Railway of August 1st, 1917, which he had required the Southern Express (among other contracts) to turn over to the American Railway Express Company. On this point it is well to call to the Board's attention, Article 14 of the Contract (Employees' Exhibit 'c'), reading:

"No change will be made in the foregoing articles until after notice of thirty (30) days, in writing, has been given."

and to point out that at no time during the period the American Railway Express Company was employed as the sole agent for the Government did it serve any notice of desire to change any of the articles, which pegged the minimum of commission rates. It must be said without fear of contradiction that even though the American Railway Express Company did agree by contract with the Director General to pay over to him the usual commissions theretofore paid upon express transportation business at stations where such station agents are joint agents as the Government's share of the agents' compensation, that such agreement between those two parties did not, and could not per se terminate the contract between the express agents on the Seaboard Air Line and the Southern Express Company of August 1st, 1917, which had been turned over to the American Railway Express Company by agreement between the Director General and the Southern Express

Company, or any part of it. That part of the Agreement between the American Railway Express Company and the Director General to pay commissions over to him, however, was never consummated as had been admitted by the Railway Express Agency, Incorporated. If the theory advanced by the Express Agency that the contract of August 1st, 1917, was thus terminated were adopted, then the fact that the Director General released the American Railway Express Company from that requirement must be considered as automatically restoring the employees' contract of August 1st, 1917, in full force and effect. This theory, however, has no substance, as the contract of August 1st, 1917, was never modified or terminated as provided in the treaty terms of its Article 14; and further, the agreement of the American Railway Express Company to pay the usual commissions to the Director General was predicated on the Director General paying the jointly employed agents the entire compensation for their services to the railroad and to the Express Company, as will be noted from a careful reading of Article XV of the Memorandum of Agreement between the parties—but this also was never consummated, and left the situation as the parties to the memorandum had found it; that is, governed by the contract of August 1st, 1917.

The terms of the contract of August 1st, 1917, were fully observed by the Southern Express Company, the American Railway Express Company as the sole agent for the Government during Federal Control, and by the American Railway Express Company after the Southern Express Company was consolidated with it by authority of the Interstate Commerce Commission immediately following the termination of Federal Control.

It was not until more than one year after the structure of the Railway Express Agency, Incorporated, had been erected on March 29th, 1929, by the railroads in the con-

tinental United States, when on April 1st, 1930, the Railway Express Agency, by an arbitrary act, individually informed the individual express agents on the Seaboard Air Line Railway, that a reduced flat commission rate of $5.00 per car would become immediately effective, and has since at various times and at vairous places, arbitrarily abolished the less car load mimimum commission rate of $10.00 per month and reduced the transfer allowance rate in disregard of the higher rates established by the contract of August 1st, 1917. This is related to show that the contract was observed by all parties until April, 1930, from which date the dispute arises.

We have also shown in our oral argument, on pages 13 and 14, in quoting from pages 427 and 428, Volume 150, Interstate Commerce Commission Reports, of the record of liabilities taken over by the Agents for the Participating Railroads from the American Railway Express Company in assuming control of operations of the express transportation business, wherein it was specified that the Agents for the Participating Railroads agreed they were:

"assuming and paying all liabilities, *whether recorded or unrecorded*, and defending or settling all claims and suits growing out of such business for the purposes above stated, the express company (American Railway Express Company) will transfer to the Agents all contract assets and contract asset accounts existing on February 28th, 1929." all of which the agents assigned to the Railway Express Agency, incorporated, to be performed by it, and that among those contract liabilities was the contract of August 1st, 1917. We contend that whether the Railway Express Agency believes it or does not believe, or whether it likes it or does not like, the contract of August 1st, 1917, which has never been terminated or modified in accordance with the terms of the agreement, was legally laid in

its lap, and that the terms thereof are still there as liabilities. (Citing, quoting from and discussing cases.)

Counsel for the defendant Express Agency argues that the Southern Express Company never assigned to the American Railway Express Company the contract of August 1, 1917, and therefore the American Railway Express Company incurred no liability by reason of the contract of August 1, 1917, which was in effect at the time the property of the Southern Express Company was turned over by it to the American Railway Express Company. It is an elementary principle of law that a contract between two or more parties becomes an obligation that is the basis of certain rights and benefits as between the contracting parties, and in this instance, the contract in question set out the rights, benefits, and privileges to be enjoyed by the employees of the Southern Express Company, the violation of which created a liability upon the part of the Southern Express Company so long as it continued as the employer of these parties for whose benefit the contract was executed. Under the decisions which we have referred to, it was not necessary that the contract should be actually assigned in order to make the American Railway Express Company answerable for the liabilities of the Southern Express Company. The cases which we have cited in the original brief clearly hold that the American Railway Express Company became liable for all of the liabilities and outstanding obligations of the Southern Express Company.

Counsel for the defendant, Railway Express Agency, Inc., on page 14 of his Memorandum of Facts, quotes from the Uniform Contract for Express Companies (Article XI, Section 1), and then says:

"Thus it appears that during the entire period of private operation by the American Railway Express Company, its

right to avail itself of the services of the railroad agents arose out of and was dependent upon the provisions of the contract between the railroad companies and the American Railway Express Company."

This might be true were it not for the fact that the many cases which we have cited have said that the American Railway Express Company was liable for the obligations of the Southern Express Company, and, if that were true, the American Railway Express Company could not destroy this obligation and liability by the provisions of the Uniform Contract for Express Operations. The contract relied upon by the complainant continued as an existing obligation the same as all other obligations which the Courts have held that the American Railway Express Company was bound to take care of, and the American Railway Express Company could not relieve itself of liability by a contract of its own making.

Counsel further says on page 15 of his Memorandum of Facts, that at the time the American Railway Express Company ceased to conduct the express transportation business on February 28, 1929, that:

"all former contracts in existence were assigned by the American Railway Express Company by specific agreement in which the three parties concerned participated. This is specifically true of labor agreements, all of which were by formal agreement relinquished by the American Railway Express Company, accepted by the Railway Express Agency; and by and with the consent of the particular labor organization involved, which was joined as the third party to each of such agreements."

We have no information as to what the Railway Express Agency did with reference to taking over the contracts of the Railway Express Company, and as to whether or not

the labor agreements it has in mind were signed by all of the parties concerned, but we do know that no such proceeding was followed with reference to the contracts of The Order of Railroad Telegraphers, or suggested.

Counsel further states and takes the position that the contract of the joint agents, the contract with which we are dealing, with the Southern Express Company "had not been accepted or adopted by the American Railway Express Company, and there was no contract between the complainant and the American Railway Express Company, and there was no assignment by the American Railway Express Company of any contract of the joint agents, and no acceptance by the Railway Express Agency of any such contract." We do not agree with this last statement and the statement does not agree with the decisions of many of the State Appellate Courts and Supreme Court of the United States. We have pointed out above that by operation of law, this contract, being an obligation and liability, became an obligation and liability of the American Railway Express Company and the Courts have so held, and that no assignment of it by the Southern Express Company to the American Railway Express Company was necessary to carry it over as a liability of the American Railway Express Company. This we believe is clearly the holding of the cases which we have cited in the former brief and referred to in this.

This is also significant, and we believe important in indicating as to whether or not the American Railway Express Company and the Railway Express Agency, Inc., took into consideration the contract in question. The American Railway Express Company, during all the years that it conducted the business, observed the provisions of this contract with the employees and carried out its terms and conditions. The Railway Express Agency, Inc., took over the business on March 1, 1929, and for a period of one

year and more, it recognized this contract, in this: that the provisions of the contract were complied with in its dealings with the employees of the Railway Express Agency, Inc., covered by the contract. Having treated those employees as if this contract was in full force and effect during all this period, the Railway Express Agency, Inc., is now estopped to deny that the contract existed and that it was governed by the terms of the contract.

Respectfully submitted,

R. F. THOMPSON,
General Chairman of The Order of Railroad Telegraphers, Representing the Express Agents at stations on the Seaboard Air Line Railway.

G. H. JOSLIN,
Vice-President, The Order of Railroad Telegraphers.

183 "EXHIBIT 8."

Before the National Railroad Adjustment Board
Division Three.

The Order of Railroad Telegraphers, Complainant,
vs. Docket TE-247.
Railway Express Agency, Incorporated, Defendant.

Reply of Railway Express Agency, Incorporated, to Surrebuttal of the Complainant on the Question of the Board's Jurisdiction.

The surrebuttal of the complaint on the question of the Board's jurisdiction is presented under several headings.

and we shall follow its order in this reply. The first topic discussed in the surrebuttal is the question of jurisdiction raised by Railway Express Agency on the ground that the members of complainant's organization are not employees of Railway Express Agency within the terms of the Railway Labor Act.

(Omitted as not now material in view of appellant's second amendment.)

As to the second point covered by the surrebuttal, headed "As to Organization Representation", appearing at pages 9 to 11, we shall content ourselves to a reference to the discussion appearing in our "Point II" in our Memorandum of Facts and Argument, dated March 5, 1936.

The third and fourth headings "Status of Contract" and "Decisions of the Courts," represent, very largely, a repetition of the argument originally presented by complainants. We dislike to burden the Board with a restatement of the arguments we have made, and we think it necessary only to refer to our Memorandum, and, for the purpose of emphasis, to review briefly the points set forth therein, namely:

1. That the contract relied upon by complainant was one executed by the Southern Express Company and was never turned over to or accepted by the American Railway Express Company; that the Southern Express Company continued to be and still is a corporation, and that the contract in question was not assigned by the Southern Express Company to the American Railway Express Company, and, accordingly, could not have been transferred, assigned or taken over by the Railway Express Agency from the American Railway Express Company.

2. That the contract between the Director General of Railroads and the American Railway Express Company, effective July 1, 1918, specifically provided that the Express Company might employ employees of the Director General subject to the condition that the Express Company should pay to the Director General the usual commissions theretofore paid upon express transportation business by reason of which it was impossible for the American Railway Express Company to take over the contract which the Southern Express Company had made with its joint agents, even if it be assumed that the American Railway Express Company desired to do so. We repeat that the American Railway Express Company did not desire to do so, and did not do so.

3. The American Railway Express Company was not a consolidation of the Southern Express Company, and of other Express Companies, the Southern Express Company continued as a corporation. The American Railway Express Company started business as a new corporation, succeeding the Southern Express Company in the handling of express business on certain railroads, by virtue of a contract with the Director General of Railroads, acting for the United States Government. It is true that certain Courts held the American Railway Express Company responsible for certain preexisting debts or obligations of the old Express Company, but, as has been fully pointed out in our Memorandum at pages 7 to 13, this was on the theory of fraud, which would and could apply only to past transactions. The ruling of those cases did not apply and properly could not apply to contracts for the future. The American Railway Express Company was free to assume and take over such contracts as it desired to do; it was under no obligation to continue in effect contracts in which it did not desire to participate. We repeat that the contract of the Southern Express Company with its Joint Agents was not accepted by the American Railway Express Com-

pany; it was not assigned to it; it was not transferred to it, and the American Railway Express Company never acted thereunder; it continuously and repeatedly refused to be governed thereby.

The contract of the Southern Express Company with its Agents never having been assigned to or accepted by the American Railway Express Company, and the American Railway Express Company never having entered into such an agreement, there really can be no question in this proceeding as to the successorship of the Railway Express Agency to such contract, or as to its being bound by any of the provisions thereof. It may be added, however, that no such contract ever was assigned to or accepted by the Railway Express Agency from the American Railway Express Company, and that Railway Express Agency has no contract with the complainant herein.

* * * complainant's organization has no contract with defendant as alleged by it out of which a dispute might arise over which this Board would have jurisdiction, and, accordingly, this Board is without jurisdiction in this proceeding, and it should be dismissed.

Respectfully submitted,
RAILWAY EXPRESS AGENCY,
INCORPORATED,
By ALBERT M. HARTUNG,
Attorney.

230 Park Avenue,
New York, N. Y.

Dated, April 6, 1936.

186 "EXHIBIT 9."

Docket Number TE-247.

Third Division.

Willard E. Hotchkiss, Referee.

Parties to dispute:

The Order of Railroad Telegraphers,

Railway Express Agency, Incorporated.

Dispute:

"Claim of the General Committee of The Order of Railroad Telegraphers on Seaboard Air Line Railway that:

(1) The commission rate on carload express shipments accruing to the joint railway-express agent at Lawtey, Fla., as established by Article 2 of the Express Agreement of August 1, 1917, and at all other joint agencies on Seaboard Air Line handling carload express shipments, shall be restored as of the date the rate was arbitrarily reduced.

(2) That the minimum amount of commission of ten dollars ($10.00) per month, as established and guaranteed by Article 2 of the Express Agreement of August 1, 1917, shall be restored to the joint railway-express agency at Rutherford, Ala., and at all other joint railway-express agencies where the minimum rate has been arbitrarily reduced or reduced through individual agreement between the express company and agent; and that these agents be retractively reimbursed in the amount of the difference that should have been paid under the express agreement.

(3) That all transfer allowances established by Article 3 of the Express Agreement of August 1, 1917, and higher rates in effect which have been arbitrarily changed, or changed by individual agreement, as at Moncure, N. C., shall be restored retroactively to the date such changes were made in violation of the Express Agreement, and all agents affected be paid the difference due them under the Express Agreement."

Findings:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

The case comes before this division of the Adjustment Board exclusively on the question of the Board's jurisdiction.

The parties to said dispute were given due notice of hearing thereon.

As a result of a deadlock Willard E. Hotchkiss was appointed as Referee to sit with the Board as a member thereof.

On request, there has been a rehearing of the case with the Referee sitting as a member of the division.

A long and carefully prepared record is before the Board, extensive briefs have been filed and the case has been ably argued.

Background of Dispute:

Effective July 1, 1909, a signed agreement was executed between the Southern Express Company and the Southern Express Agents, who are jointly employed as railway and express agents on the Seaboard Air Line Railway, governing rules, rates of commission and transfer allowance for agents in the employ of the Seaboard Air Line Railway, required by the Railway to also serve the Express Company as agent, or perform transfer service at railroad stations. This agreement was revised as of June 1, 1912, and again as of August 1, 1917, and was in full force and effect when the United States Railroad Administration assumed control and operation of transportation by railroad.

Article 14 of this Agreement provided:

"No change will be made in the foregoing articles until after notice of thirty (30) days in writing has been given."

On June 26, 1918, the United States Government through the Director General of Railroads, negotiated a Memorandum of Agreement with the four principal express companies operating at that time, including the Southern Express Company through the medium of a newly organized joint operating company titled the "American Railway Express Company", which company under the terms of the Memorandum of Agreement was the sole agent of the Government under the supervision of the Director General of Railroads to conduct the express transportation business upon all lines of railroad under the Federal control. The American Railway Express Company, a joint operating company for the Adams, American, Wells-Fargo and Southern Express Companies, was maintained after the termination of Federal control, and on September 1, 1920, at the end of the Guarantee Clause (Sec. 209) of the Trans-

portation Act, 1920, a "Uniform Contract for Express Operations over Rail Lines" was prepared and executed between the American Railway Express Company and Rail Companies in the United States, including the Seaboard Air Line Railway, whereby the Express Company was granted the exclusive right and privilege to control, conduct and transact all of the express transportation business over its lines.

As of March 1, 1929, the Rail Companies in the United States united in acquiring the American Railway Express Company through their own express agency, thereafter known as the Railway Express Agency, Inc., and have since conducted the operations of the express business through such express agency, and on the Seaboard Air Line Railway in particular.

The record shows that the terms of the contract, effective July 1, 1917, remained in effect until April 1, 1930, when the Railway Express Agency, Inc., placed in effect a flat rate of five dollars ($5.00) per car on carload shipments and, following that, made individual agreements with certain of the joint agents to handle express business on a straight commission basis and to reduce the transfer allowance below that specified in the agreement.

Petitioners' Position:

The petitioners submit that an agreement was entered into by the Southern Express Company in August, 1917, with a Committee of the Order of Railroad Telegraphers in behalf of the joint railway express agents, that its obligations passed to the successor companies—first, the American Railway Express Company, then the Railway Express Agency, Inc., that these obligations continued to be assumed until April 1, 1930, when in violation of the

agreement the Railway Express Agency, Inc., took the action upon which this claim is based.

The petitioners further contend that the agents are employees of the Railway Express Agency, Inc., within the purview of the Amended Railway Labor Act and that even if the agreement, effective August 1, 1917, should be held not to bind the Railway Express Agency, Inc., the Board should nevertheless take jurisdiction and decide the case on its merits as constituting a grievance to be adjusted under the terms of the law.

In support of their contentions, the petitioners argue substantially as follows:

They submit, as Exhibit "D", copies of letters during 1925 between the superintendent of the American Railway Express Company and the General Chairman of the organization which relate to changes in rates of commissions; also, as Exhibit "E", a letter of April 8, 1930, from the superintendent of the Railway Express Agency, Inc., again relating to change in rate of commissions; as Exhibit "F", a letter of December 17, 1931, from the Alabama Public Service Commission relating to a petition for closing of an agency the hearing upon which involved consideration of the changes in rates of commissions, particularly as relating to the minimum for express agents; as Exhibit "G", a letter of January 23, 1935, from the superintendent of the Railway Express Agency, Inc., changing the rate of commission paid individual agents; as Exhibit "H", another letter from the same officer dated June 5, 1935, relating to change in respect to guarantee; as Exhibit "I", an exchange of letters in 1925, between the Vice President of the S. A. L. Railway Company, the General Chairman for the employees, and the General Manager of the American Railway Express Company.

The petitioners urge that the contract between the joint agents and the Southern Express Company was taken over by the American Railway Express as one of the liabilities of the Southern Express Company, and they cite a number of decisions of various Courts as holding that it was not necessary that such contract be actually assigned in order to make the American Railway Express Company answerable for the liability of the Southern Express Company.

* * * * * * *

Respondent's Position:

The position of the Railway Express Agency is that the complainant parties are not employees of the Express Agency and that the agreement between the joint agents and the Southern Express Company is not an agreement to which the Order of Railroad Telegraphers is a party as, they contend, is evident on the face of the contract which was executed for the joint agents by one D. May. Although he was General Chairman for the O. R. T. as the plaintiff alleges, he signed this contract "For the Joint Agents" and the contract must stand as signed, not as a contract with the O. R. T. The O. R. T. not being a party to that contract, therefore, may not maintain a proceeding before this Board based upon such contract.

The American Railway Express Company, upon the execution of an agreement with the Director General of Railroads, July 1, 1918, did not adopt the agreement between the joint agents and the Southern Express Company; the latter continued to be and still is a corporation. The agreement between the Government and the American Railway Express Company specified that payment of agents' commissions would be to the Director General. A subsequent understanding did, they admit, in fact provide for payment of those commissions directly to the agents, but this they say was by specific agreement with the Di-

rector General and not in accordance with any agreement between the railway agents and the express company. The commissions were at the same rate as those of the Southern Express Company. Those commissions were determined by the contract with the Director General and, though the same as those previously paid by the Southern Express Company, were not dependent upon any contract or understanding between the American Railway Express Company and the joint railroad agents or the O. R. T.

The agreement with the Director General had a term providing that the express companies which formed the American Railway Express Company would turn over to the new corporation all contracts. However, no assignment of the Southern Express contract was ever made under the term of the new contract with the Director General. That contract never was accepted by the American Railway Express Company, and no contract was ever made between the joint agents and the American Railway Express Company and no such contract has ever been executed by the Railway Express Agency, Inc.

The respondent cited a decision of the Supreme Court of North Carolina in answer to petitioners' argument that actual assignment of contract was not necessary in order to bind the successor company (Railway Express Agency, Inc.) and held that citations by complainants were cases involving fraud. Several other citations were made and emphasized as supporting respondent's position that the August, 1917, contract is not in force.

In further support of their position, it was pointed out that beginning September 1, 1920, the American Railway Express Company began the conduct of business under a contract known as "Uniform Contract for Express Operations over Rail Lines," which continued in effect until March 1, 1923, when the "Amended Uniform Contract for

Express Operations over Rail Lines" became effective. These two contracts contained among other things provisions for the railway company's employees to act as agents of the Express Company, etc. On February 28, 1929, the American Railway Express Company ceased to conduct business and all contracts in existence were assigned by that company by specific agreement between the parties concerned. In particular reference to labor agreements, all three parties, the American Railway Express Company who relinquished, the Railway Express Agency, Inc., who accepted, and the labor organization involved, joined.

* * * * * * * * * *

The respondent advanced further argument against covering this case in under the terms of the Amended Railway Labor Act to the effect that the contract which petitioners allege was violated antedates the Transportation Act.

Opinion of Referee:

The Referee is not disposed to enter into any minute analysis of the somewhat elaborate legal arguments advanced by the parties to this dispute. For the most part he believes that they are not crucial to the basic issues involved in the case.

Irrespective of the present validity of the contract between the joint agents and the Southern Express Company, effective August 1, 1917, and irrespective of the status of Mr. May as a signatory of that contract, the fact remains that the practice by which railway agents are paid commissions for services performed for companies other than their principal employer, the particular railroad company, is sufficiently general to be regarded as part and parcel of the system under which industrial relations on American rail-

ways are conducted. The recipient of commissions under such a system is in an entirely different status, both as regards his primary employer, the railway company, and as regards his secondary employer, in this case the Railway Express Agency, Inc., from a person who has occasional or fortuitous opportunity to increase his regular wages by supplementary earnings.

From whatever point of view regarded, the relationship between any given Railway, The Railway Express Agency, Inc., and the joint agent who works on that railway, is a triangle no side of which can be removed or weakened without considering what the result will be to the other two sides.

If this Board is legally empowered to clarify the respective rights and responsibilities of the parties to this three-cornered arrangement, it will probably be better in the long run for all concerned to have that done than it will for them to be continuously involved in needless disputes.

Since the Agreement of August, 1917, was supposedly in force prior to April 1, 1930, we are warranted in assuming that commissions figured in negotiating the wage agreement with agents on this Railway, and this fact cannot be ignored in dealing with cases in which commissions are involved.

The Referee finds, therefore, in this, as in any other case in which express commissions were considered in establishing the wage scale for agents on any railway, an obligation exists either to maintain the rate of commissions intact or adjust the wage scale to compensate for changes in the rate of commissions until such time as the wage rates or the commissions, or both, are changed in accordance with Section 6 of the Amended Railway Labor Act.

But the relationship between express commissions on the one hand and the rate which agents are paid by the railway on the other, goes even deeper than this. As long as a railway company and the Railway Express Agency, Inc., are in a position to shift responsibility back and forth they will be under strong pressure to do so with the result that the purposes of the Amended Railway Labor Act, in respect to this three-cornered relationship, will be impeded. These purposes as stated in Section 2 are as follows:

"Section 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

In the same section, the purposes of the act are further amplified in the first paragraph under "General Duties." This paragraph reads as follows:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The railways of the country and the Railway Express Agency, Inc., are both covered by this law. There can be no doubt that Congress intended that employer-employee relationships involving express business, as well as relationships involving railway business direct, should be amicably, efficiently and promptly adjusted under the provisions of the law.

Argument was advanced in a case which is being decided concurrently with the instant case and from which part of the language of this decision is borrowed, Award 297 (TE-271) to the effect that the agents involved in that case were not employees of the Railway in respect to express business in such a way as to make the railway contractually liable for their commissions. In this case argument involving elaborate definition of the abstract legal requirements requisite to establish the employer-employee relationship is advanced for the purpose of establishing in law, the fact that agents are in no sense employees of the Railway Express Agency, Inc.

The Referee has noted carefully the citations in these two cases, by which disclaimer of responsibility for commissions is supported. He is prepared to admit as a matter of abstract legal definition that the citations do in fact appear to support the argument advanced. However, as applied to the instant case, it is not possible to uphold disclaimer of respondent for obligation to maintain the rate of commissions, in the light of an instrument which, over a long period of years, was mutually regarded as an agreement by the joint agents and the Southern Express Company and its successors, and which specified definitely how it could be terminated. The instrument has all the earmarks of being an agreement in respect to an employer-employee relationship. Without challenging any of the legal citations advanced, there would appear to be grave doubt whether a relationship which has continued over a

long period of years under an instrument which to all intents and purposes is an employer-employee agreement and, which contains specific stipulation for its termination, can suddenly be arbitrarily relieved of the attributes of an employer-employee relationship by ex parte action.

If, as in several other cases which have come before the Board, the parties had entered into some temporary arrangement, there are many circumstances which would permit ex parte denouncement of such an arrangement. Such action in at least one case has been upheld by this Referee Award 272 (CL-276). In the instant case, however, there can be no serious question that the instrument of August, 1917, operated with all the force and effect of a regular agreement from its inception, until April 1, 1930, when it was terminated, if at all, by the ex parte action of the Railway Express Agency, Inc.

The fact that the ex parte action of the Railway Express Agency, Inc., antedated by more than three years the passage of the Amended Railway Labor Act might, as respondent maintains, weaken the arguments of petitioners that this Board should assume jurisdiction if the Agreement of April 1917 and the Act of 1934 were the only instruments and the only legislation by which the triangular relationship between joint agents, the railway involved in the particular case, and the Railway Express Agency, Inc., were covered. That, however, is not the situation. Triangular arrangements like the one here under consideration have been for many years standard practice on American Railways and the legislation of 1934 is amendatory of previous legislation which, under different forms and provisions, had to a considerable extend the same purpose in respect to industrial relations as the Amended Railway Labor Act of 1934. This was notably true of the Act of 1926.

In considering the essence of these triangular relationships, the Referee cannot fail to note the close connection between the railways of the United States and the Railway Express Agency, Inc. Although the Express agency is a separate corporation, it is owned and controlled by the carriers over whose lines express business is carried. Ambiguity concerning the status of employees who serve both the railways and the Railway Express Agency, Inc., and whose total compensation is made up of regular wages—hourly, daily, or monthly as the case may be, paid by the railway, and of commissions paid by the Railway Express Agency, Inc., must inevitably make for confusion and discord instead of the prompt and orderly settlement of disputes which it was the purpose of the Amended Railway Labor Act, and substantially of earlier legislation, to promote.

For the purposes of the Amended Railway Labor Act which covers the Railway Express Agency, Inc., as well as the railways, it appears clear that agents are primarily employees of the particular railroad on which they work and, secondarily, employees of the Railway Express Agency, Inc., whom they serve. Legal definitions aside, they serve the Railway Express Agency, Inc., year in and year out as agents and it is not vital to the issues involved whether we call them agents or employees or functionaries or any other title which we may use to describe their positions.

The salient fact is that express commissions are inextricably interwoven with the wages which railways contract to pay agents. It must, therefore, be held especially in view of the close property relationship between the railways and the Railway Express Agency, Inc., that the Railway by which an agent is primarily employed and the Railway Express Agency, Inc., by which he is second-

arily employed, are jointly and severally obligated to maintain the wage structure of agreements, insofar as express commissions are found to be an essential factor in determining the wages to be paid by the railway. In the judgment of the Referee, this ruling would be sound even though the railways and the Railway Express Agency, Inc., were not, in these corporate relationships, as closely interwoven as they are. With them so interwoven, such a realistic approach becomes inescapable.

The most effective way in which the railways and the Railway Express Agency, Inc., can discharge the duties imposed by agreements and by the Amended Railway Labor Act is to meet squarely the general question how matters involving express commissions supplemental to wages paid for service to the railway shall be handled. That is the responsible way to proceed and in the judgment of the Referee it will prove in the long run more satisfactory for all concerned, then to be confronted by the inevitable disputes sure to result from shifting responsibility back and forth.

In the case referred to above, Award 297 (TE-271), decision on which is being rendered concurrently with decision in the instant case, the Referee was not advised of the existence of any formal agreement between the Railway Express Agency and the Agents primarily employed by the carrier involved in that case. The Referee held, however, that the force of established practice in respect to express commissions taken together with the fact that the rate of commissions on express business was a vital factor in determining the rate structure in respect to the service performed for the railway made the responsibility to pay commissions at the rate contemplated when the rates on the railway were agreed to tantamount, in the purview of the Amended Railway Labor Act, to a tri-

angular agreement between the three parties involved and subject to termination only in conformity with the provisions of the Act.

In the instant case, whether or not we regard the agreement of August, 1917, as still in effect, the long years during which that agreement was operative would in the judgment of the Referee fortify the position which he took in Decision on TE-271 (Award 297).

As in that case, the Referee is aware that in holding the railway concerned and the Railway Express Agency, Inc., jointly and severally liable under agreements in which express commissions constitute a factor in the wage structure of agents, the question remains open whether to make the Railway or the Railway Express Agency or the two together respondents in cases involving express commissions. Repeating the language of the decision in Award 297 (Docket TE-271), "The answer to that question would naturally depend upon the language of the particular agreement and the circumstances surrounding the case." In that case the Railway Express Agency, Inc., and the railway were both participants in the change in commissions of which complaint was made. The Referee held in that case that the petitioners would have been within their rights under the agreement and under the Amended Railway Labor Act to have haled the railway and the Railway Express Agency jointly before the Board; he also held that they were equally within their rights in making the railway the respondent.

In the instant case, the long history of contractual relationships between the predecessors of the Railway Express Agency, Inc., and the joint agents makes it proper for the representatives of the joint agents, the O. R. T., to hale the Railway Express Agency before this Board. Since the O. R. T. has long been the acknowledged representa-

tive of agents in their dealings with the railways and is now officially recognized as such representative, the Referee holds that the capacity in which D. May signed the agreement of August, 1917, is not material to the issues of this case.

Courts are frequently called upon to resolve legal impasses of the kind which would result from a strictly legalistic interpretation of the contentions which have been advanced in this case. The high authority of the Supreme Court of the United States may be invoked for applying the rule of reason to an impasse of this kind and that is the way in which the Referee has been disposed to approach this decision. He, therefore, holds that the petitioners are within their rights in haling the Railway Express Agency, Inc., before this Board.

Award.

Let the case be heard on its merits.

NATIONAL RAILROAD ADJUSTMENT BOARD,
By Order of Third Division.

Attest:
H. A. JOHNSON,
Secretary.

Dated at Chicago, Illinois, this 17th day of September, 1936.

195 "EXHIBIT 10."

Before the National Railroad Adjustment Board, Third Division.

The Order of Railroad Telegraphers,
vs. Docket TE-247.
Railway Express Agency, Incorporated.

Response of Railway Express Agency, Incorporated.

Railway Express Agency, Incorporated, in deference to the ruling of the Board that this case be heard on its merits, herewith respectfully submits its response to the claim of The Order of Railroad Telegraphers, without conceding, and specifically reserving, its position that this Board is without jurisdiction of the claim, under the provisions of the Railway Labor Act, as amended.

I.

We shall not burden the Board with a repetition of the grounds on which we contend that this Board is without jurisdiction, or renew our argument as to that aspect of the proceeding, except to state that in reaching its conclusion as to jurisdiction, the Board has taken the position that there is in effect an agreement between The Order of Railroad Telegraphers and Railway Express Agency, Inc., on the improper assumption that an agreement between the Southern Express Company and its Joint Agents was assumed by the American Railway Express Company, and, in turn, by the Railway Express Agency, Inc., because the same rates of commission which previously had been paid to railroad employes, serving also as express agents, were continued in effect for a number of years, and because the Courts had, in some instances, decided

that the American Railway Express Company was responsible for certain claims for loss and damage to shipments, and personal injuries, of the Adams Express Company, Southern Express Company and Wells Fargo & Company, which had accrued during the period those companies conducted the express business. In so deciding, the Board disregarded the positive sworn testimony which had been presented to it, to the effect that the agreement between the Southern Express Company and its joint agents never had been assigned by the Southern Express Company to the American Railway Express Company, never had been accepted by the American Railway Express Company, and never had been assumed by that Company, and that the complainant organization, and its officers, repeatedly has been so advised. Of course, there never has been any contention on the part of the complainant that Railway Express Agency, Inc., has entered into any agreement with it, and it rests its claim solely on the ground that the agreement between the Southern Express Company and its joint agents became successively binding on the American Railway Express Company and the Railway Express Agency. As has just been stated, the proof is indisputable, that the agreement never was assumed by the American Railway Express Company, and, obviously, under those circumstances, it could not have been assumed by Railway Express Agency, Inc., and, in fact, it was not so assumed by Railway Express Agency, Inc.

In view of the action of the Board in taking jurisdiction, we have thought it desirable somewhat to amplify the evidence with respect to the point that the agreement of the Southern Express Company with the joint agents was not assumed by the American Railway Express Company, and later by Railway Express Agency, Inc., and call attention to the affidavit of Mr. L. R. Gwyn, Vice-Presi-

dent in Charge of Personnel, of Railway Express Agency, Inc., attached hereto and made a part hereof, in which he states definitely and positively that neither the American Railway Express Company nor Railway Express Agency ever have had any agreement with The Order of Railroad Telegraphers, and that the agreement of the Southern Express Company with its joint agents, never was assigned to, accepted by, or assumed by the American Railway Express Company or the Railway Express Agency, and that The Order of Railroad Telegraphers, and its responsible officers, repeatedly have been so advised, and, in support of his statements, attaches to his affidavit his letter of October 6, 1925, to Mr. B. C. Lewis, General Chairman of The Order of Railroad Telegraphers, and quotes testimony introduced by him in a proceeding before the United States Railroad Labor Board on February 26, 1926, in Docket 4624. This evidence is too clear, convincing and positive, to require further comment or discussion, and it seems to us that, upon further consideration, this Board necessarily must conclude that there is not now and there never has been in effect an agreement between The Order of Railroad Telegraphers and Railway Express Agency, and that the claim herein presented, which rests upon the theory that such agreement exists, must fall, and the case be dismissed.

II.

Coming now to the discussion of the alleged reduction in the commission rate on "carload" express shipments accruing to the joint railroad-express agent at Lawtey, Florida, we call attention to the attached affidavit of W. W. Owens, Vice-President, Southern Departments, Railway Express Agency, Inc., and, immediately prior to April 1, 1929, holding a similar position with the American Railway Express Company, for which Company he

had previously served as General Manager at Jacksonville, Florida and Washington, D. C., since July 1, 1918, before which time he has been Vice-President of the Southern Express Company, having jurisdiction over Accounting, Traffic, Treasury and Supply Departments. Mr. Owens states that the Seaboard Air Line Railway Company had in its successive contracts with the Southern Express Company, American Railway Express Company and Railway Express Agency, Inc., specifically reserved to itself the right to handle the transportation of carload shipments of perishables in refrigerator cars, and that the express companies did not conduct, or have the right to conduct, that business over the lines of the Seaboard Air Line Railway. For many years the shippers of strawberries from Florida, and the Florida Railroad Commission, had endeavored to secure express service for carload shipments of strawberries in refrigerator cars from Florida to northern and eastern markets, and, finally, in June, 1929, the Interstate Commerce Commission directed the Seaboard Air Line Railway Company, and other railroad companies, to furnish refrigerator cars for the movement of strawberries from Florida to northern and eastern markets on schedules which would provide service equivalent to passenger train transportation.

The time intervening between the date of the service of the order and the beginning of the strawberry movement from Florida, was insufficient to enable the railroad companies themselves to undertake the service, and shortly prior to the commencement of the season, the Seaboard Air Line Railway Company requested the Railway Express Agency to take over the handling of the traffic during the 1929-30 season with the specific provision that the arrangement was to expire on June 30, 1930; the same arrangement was made for the 1930-1931 season, and the 1931-1932 season, and for subsequent seasons.

When this special arrangement was entered into, consideration was given to the arrangement which would be made for the handling of the traffic from points like Lawtey, Florida, where the express business was being handled by a joint railroad-express agent.

Starke and Lawtey, both located on the Seaboard Air Line Railway, and not far distant from each other, are two principal shipping points of strawberries from the so-called northern strawberry shipping district of Florida. At Starke, the Railway Express Agency has an exclusive agent, who is paid a salary, and, in order that the business at Lawtey might be conducted on substantially the same basis, it was decided that an exclusive office, likewise, should be established there, since the payment of the same rate of commission on carload shipments, as was being paid on less-than-carload shipments, would be wholly disproportionate and grossly excessive. This was especially so because the services performed by the agent are substantially less in connection with the carload shipments than with the l. c. l. shipments. On the l. c. l. traffic the agent not only has to issue the receipt and waybill the shipment, but he is obliged to move that shipment to the express car in the passenger train, load and unload the traffic on station trucks and move the traffic to and from the depot office; whereas, in connection with the carload traffic the loading, bracing and counting of the contents of the car, is performed entirely by the shipper, and all the agent has to do is to issue a receipt, waybill the car and arrange for its train movement from the point of origin.

The decision of the Express Agency to establish an exclusive agency at Lawtey obviously was the economical, proper and practical thing to do, but when arrangements to that end were undertaken, the joint railroad-express agent at Lawtey specifically requested that he be

permitted to handle this new carload business, and agreed to do so at a compensation amounting to $5.00 per car, as it is evidenced by his letter of November 29, 1929, to A. B. Scruggs, Superintendent, at Jacksonville, Florida, a copy of which is presented in full in the attached affidavit of Mr. Owens.

The basis of compensation so agreed upon is comparable to that paid in other parts of the United States where carload shipments of perishable commodities are handled by express, and the scale of compensation so agreed upon resulted in the payment of express commissions to the agent at Lawtey of $2,076.61 in 1930, in comparison with $1,732.44 in 1929, and $1,185.43 in 1923 (in addition to the compensation received from the railroad company for acting as its agent at Lawtey).

The impropriety of the payment of the same rate of commission on carload traffic that is applicable to l. c. l. shipments, is shown very fully in the affidavit of Mr. Owens, and further elaboration of this point seems unnecessary here. It suffices to say that the application of the commission rate of 10 per cent paid on l. c. l. shipments would result in the payment of a commission of $49.60 on *one* carload shipment of strawberries from Lawtey, Florida, to New York City, moving at the minimum billing weight, and that the same rate applied to the season of 1930 results in a claim for further compensation of $4,203.43, in addition to the payment of $5.00 for each carload shipment.

When consideration is given to the fact that this business moves during a period of six weeks to two months, which is the shipping season of strawberries from that section of Florida, to the negligible amount of service performed by the agent in connection with the handling

of such shipments, to the fact that he received $660.00 in commissions on such shipments, in addition to his commissions on the l. c. l. express business, and his salary as railroad agent, it seems unnecessary to say more to establish the utter impropriety and inequity of allowing the l. c. l. rate of commission, which would call for the payment of an additional $4,203.43.

The affffidavits of Mr. Gwyn and Mr. Owens show that the American Railway Express Company, for practical reasons, continued the same rates of commission in effect which had previously been paid by the various express companies which conducted the express business prior to July 1, 1918. As Mr. Gwyn states in his affidavit "The mere fact we continued those rates does not mean anything. We continued the salaries. We continued the rates of commission every place just as they were. We took the business of these other companies as a going concern and kept it going, but we did not increase or decrease the commissions in the southeast or any other part of the country. We continued those commissions and in a very large way we continue to pay those rates today, but it is no more true of the southeastern section of the country than it is of New England, if you like. As a matter of fact, under the Director General we would not have had authority either to increase or decrease those rates, except with the consent of Mr. McAdoo, but we never did assent to the assumption of that contract, and when we were asked to revise it so notified the organization."

The continuation of the commissions at the same rate was not because of the agreement between the Southern Express Company and its joint agents, it was the only action which could be taken from a practical standpoint; the commissions varied in different sections of the coun-

try, the only feasible workable thing to do was to continue those commissions in effect unless and until investigation developed that some other action should be taken as to all of them or some of them. That is exactly what has happened. Thereafter, from time to time, revisions have been made in the rate of commissions paid to joint railroad-express agents, and in the transfer allowances, and those revisions have been upward as well as downward, dependent upon business conditions.

III.

In conclusion we repeat that Railway Express Agency never has entered into an agreement with The Order of Railroad Telegraphers, and that it has not assumed the agreement between the Southern Express Company and its joint agents, and the complainant herein repeatedly has been so advised by Railway Express Agency, and long prior thereto by American Railway Express Company, and the claim presented herein is without merit and should be dismissed.

Respectfully submitted,
RAILWAY EXPRESS AGENCY,
INCORPORATED.
By ALBERT M. HARTUNG,
Attorney.

230 Park Avenue,
New York, N. Y.
Dated: December 14, 1936.

Before the National Railroad Adjustment Board, Third Division.

The Order of Railroad Telegraphers,
vs. Docket TE-247.
Railway Express Agency, Incorporated.

State of New York,
County of New York, ss.

I, W. W. Owens, being duly sworn, deposes and say that: I am Vice-President of Railway Express Agency, Incorporated, Southern Departments, with headquarters at Atlanta, Georgia. The Southern Departments cover generally all of the operations of Railway Express Agency south of the Ohio and Potomac Rivers and east of the Mississippi River; in other words, the southeastern section of the United States. The Seaboard Air Line Railway Company is one of the railroads operating in this territory. I have held this position since September 1, 1931. From July 1, 1918 to January 1, 1921 I was General Manager of the American Railway Express Company, with headquarters at Jacksonville, Florida. On January 1, 1921, I was transferred to Washington as General Manager, with headquarters in that city, and continued in that capacity until the American Railway Express Company ceased to do business on February 28, 1929. I retained the same position with the Railway Express Agency from March 1, 1929 until September 1, 1931, when I was appointed to my present position. Prior to July 1, 1918, I was connected with the Southern Express Company for many years, latterly as Second Vice-President at Chattanooga, Tennessee, having jurisdiction over Accounting, Traffic, Treasury and Supply Departments.

Under the provisions of the contract between the Southern Express Company and the Seaboard Air Line Rail-

way Company, providing for the conduct of the express business on that railroad by the Southern Express Company, the Express Company did not conduct the transportation of carload shipments of perishables in refrigerator cars; the railroad company having specifically reserved to itself the right to handle that business.

When the American Railway Express Company commenced express operations on July 1, 1918, the same conditions continued. When the Uniform Contract for Express Operations between the American Railway Express Company and the Seaboard Air Line Railway Company became effective, September 1, 1920, the railroad company specifically excluded the handling of perishable commodities in carloads in refrigerator cars from express service, and continued that exclusion during the period of Amended Uniform Contract, which became effective March 1, 1923. The Seaboard Air Line Railway Company made the same restriction and reservation in the Standard Operations Agreement with the Railway Express Agency, which agreement became effective March 1, 1929.

For many years the shippers in Florida and the Railroad Commission of that State, had endeavored to secure passenger train transportation for carload shipments of strawberries in refrigerator cars, and, in 1929, following extensive and prolonged hearings, the Interstate Commerce Commission issued an order directing the Seaboard Air Line Railway Company, and other railroad companies, to provide on or before December 1, 1929, and thereafter to furnish refrigerator cars for the movement of strawberries from Florida to Eastern and Northern markets on schedules which would provide service equivalent to passenger train transportation; (*Transportation of Strawberries by Express*, etc., 156 I. C. C. 4).

The time intervening between the date of the service of the order and the beginning of the strawberry movement, was insufficient to enable the railroad companies themselves to provide passenger train equipment, and to make all the necessary arrangements for the movement, including interchange with connecting lines, and, shortly prior to the commencement of the season, the Seaboard Air Line Railway Company requested the Railway Express Agency to take over the handling of the traffic during the 1929-1930 season, with a specific agreement that the arrangement was to expire on June 30, 1930, thereby waiving the provision of the Standard Operations Agreement to the extent that the Agency might conduct the business during the 1929-1930 season. The tariffs of the Express Agency, covering the service, provided that the rates and service expired June 30, 1930 (Railway Express Agency Tariff I. C. C. No. 132).

With the beginning of the season 1930-1931, the Seaboard Air Line Railway Company decided that as a result of the experiment for the season 1929-1930, it would renew the arrangement for another year, and that was made effective and covered by tariff issued by the Railway Express Agency (Railway Express Agency Tariff I. C. C. No. 227), which expired June 30, 1931. The same situation was renewed for the season 1931-1932, and tariff was issued by the Railway Express Agency and filed as Railway Express Agency Tariff I. C. C. No. 299, to expire June 30, 1932, and, for subsequent reasons, the Seaboard Air Line Railway Company has permitted the special contract to remain in effect.

When this special arrangement was made it became necessary to give consideration to the compensation which was to be paid to joint railroad-express agents at points where this business originated. Obviously, it is entirely

inconsistent to pay the same rate of commission on a carload shipment as on a less-carload shipment, particularly in view of the fact that the services to be performed by the joint agent are substantially less in connection with the carload shipments than with the l. c. l. shipments. On all less carload traffic, in addition to issuing a receipt and waybilling the shipment, the agent is obliged to meet the express car in the passenger train; load or unload the traffic on station trucks, and move the traffic to or from the office located in the depot. In connection with carload traffic, the loading, bracing and counting the contents of the car is performed entirely by the shipper, and all the agent has to do is to issue receipt and waybill the car and arrange for its train movement from point of origin.

In considering the handling of strawberries by express from Florida, it was recognized that abnormal commissions would accrue at the regular rate paid for less-than-carload business, and it was, therefore, decided to establish an exclusive office at Lawtey, similar to the Agency at Starke, a few miles away. The majority of the berries produced in this section are grown in the territory lying between Starke and Lawtey. Some of the berries are shipped from Starke and some are shipped from Lawtey. At Starke, the agent of the Express Agency is an exclusive agent, and in order that the business at Lawtey might be conducted on substantially the same basis as other business which originates in the same area, it was decided that an exclusive office should be established at Lawtey, but when arrangements to that end were undertaken, the joint railroad agent at Lawtey specifically requested that he be permitted to handle this new carload business, and agreed to do so at a compensation amounting to $5.00 per car, as is evidenced by his letter of November 29, 1929, to A. B. Scruggs, Superintendent, Jacksonville, Florida, reading as follows:

"The position of the express company on the matter of commissions on car lot shipments was outlined to me today and I am agreeable to accepting $5.00 per car on such shipments.

"It is my understanding that the practice will be general on the Seaboard Air Line.

Yours truly,
C. DINKINS,
Agent."

This basis of compensation is comparable to that paid in other parts of the United States where carload business under refrigeration is handled by express. As illustrating the absurdity of paying express commissions on this new carload traffic at the same rate as on the l. c. l. business the commission on a car from Lawtey to New York, at a rate of ten per cent would be $49.64, on a carload billed at the minimum billing weight. Such payment obviously is entirely unreasonable and out of proportion to the service rendered. The payment of $5.00 on each car moved in 1930, resulted in a claim for addition commission of $4,203.43 being filed, representing the difference between the amount which would have been paid had the l. c. l. commission rate basis been applied and the amount which was actually paid at the agreed upon rate of $5.00 for each car. The absurdity of this compensation in connection with the service rendered is apparent, and particularly so, when consideration is given to the fact that this business moves within a period of six weeks to two months, which is the shipping season of strawberries from that section of Florida. It should not be overlooked that this claim is for an amount in addition to the allowance of $5.00 per car that was paid.

The absurdity of paying the same rate of commission on carload traffic that is applicable to l. c. l. shipments is

further illustrated in the compensation that would have accrued on the carload business at Lawtey for the season 1931, estimated to be $6,283.40, in addition to the payment of $5.00 per car which was made to the joint agent. The season of 1932 was smaller than 1931, but the additional commission is estimated to be $2,509.73, if paid on the l. c. l. basis. In 1933, on account of increased volume, the additional commission on the l. c. l. basis is estimated at $4,840.60, and, in 1934, because of a smaller volume, the amount is estimated to be $2,748.23.

The company would not have authorized the continuance of the Lawtey office under a joint commission arrangement which carried with it the payment of commissions on such an extravagant basis, and it was only because of the agreement of Agent Dinkins to handle the business on a basis of the payment of $5.00 per car that the arrangement for a joint commission office was continued. In fact, our representative went to Lawtey for the specific purpose of appointing an exclusive agent to serve the Express Agency on a salaried basis, and we were deterred from doing so only by the representation and agreement of Agent Dinkins, that he desired to continue to represent the Express Agency on the basis of his receiving compensation on the carload shipment of strawberries at $5.00 per car.

In this connection it is significant that in 1928 the commissions paid to Agent Dinkins at Lawtey amounted to $1,185.43; in 1929 they amounted to $1732.44, and in 1930, the first year which included the commission on the carload shipments, the commissions amounted to $2,076.61, and if commission had been paid on carloads at the basis now claimed, the agent would have been paid $4,203.43 additional, a total of $6,280.04; and, it is to be borne in mind, that these express commissions are in addition to

the compensation which he receives from the railroad company for acting as its agent at Lawtey.

For several years prior to July 1, 1918, there was in effect an agreement between The Order of Railroad Telegraphers and the Southern Express Company, with respect to the rates of commission to be paid to joint railroad-express agents on certain railroad lines, including joint offices on Seaboard Air Line Railway, but when the American Railway Express Company was formed and it began the conduct of the express transportation business under contract with the Director General of Railroads, a new situation arose. That contract provided for the payment of express commissions directly to the Director General of Railroads, but by his subsequent order the express commissions were, in fact, paid to the joint agents. There was no agreement of any kind as to the rate of commissions to be paid, but American Railway Express Company continued for the time being to pay the same rate of commissions which had previously been in effect. The increases in the wages of express employes which took place during the period of Federal Control, and the subsequent increases and decreases which have been made in the wages of express employes, have in no instance applied to the joint railroad-express agents, whether such increases or decreases have been made voluntarily by the express company, or as a result of orders by regulatory bodies, or in arbitration proceedings.

Generally speaking, there has been no change in the rates of commission paid to joint railroad-express agents during the period of operation by the American Railway Express Company and by Railway Express Agency, but in some instances where conditions changed the rate of commission which was paid has been revised. For instance, at Rutherford, Alabama, concerning which claim

is presented herein, the entire revenue on express business for the year 1932 amounted to $207.50, on which a minimum commission of $10.00 per month or $120.00 for the year was paid, or, approximately, sixty per cent of the gross receipts. This condition continued in the forepart of 1933, and in view thereof the office was closed on June 28, 1933, under and in pursuance of the authority of the Alabama Public Service Commission. Subsequently, the agent requested, in letter dated August 23rd, 1933, that the agency be reopened, stating that he was willing to handle the business at a commission rate of ten per cent without minimum. Accordingly, the office was reopened on October 6, 1933, pursuant to such agent's request, and on the basis proposed by the agent to which the Express Agency agreed. In a few other cases the same situation has existed, and the same action has been taken.

At junction points between main and branch line rail operations a transfer allowance is usually paid to the joint railroad-express agent for handling the business interchanged. Such was the condition at Moncure, North Carolina. At that point a payment of $10.00 per month was made to the joint agent for handling the business originated at or destined to an office on the branch rail line extending from Moncure to Pittsboro. In 1932 the volume of business interchange at Moncure dropped to such an abnormally low level that the joint railroad-express agent readily agreed to accept a reduction of $5.00 per month, and this condition continued until June, 1936, when the business having increased to such an extent as to justify such action, the former transfer allowance of $10.00 per month was restored and is still in effect.

W. W. OWENS.

Subscribed and sworn to before me this 8th day of December, 1936.

JAMES P. GUYRE,
Notary Public, Westchester County.

(Seal)

Before the National Railroad Adjustment Board, Third Division.

The Order of Railroad Telegraphers,
vs. Docket TE-247.
Railway Express Agency, Incorporated.

State of New York,
County of New York, ss.

I, Lewis R. Gwyn, being duly sworn, depose and say that: I am Vice President in charge of Personnel of Railway Express Agency, Incorporated, with office at 230 Park Avenue, New York City, and I have held such position since the Railway Express Agency began the conduct of the express business March 1, 1929. I entered the express service of the American Express Company January 1, 1892, and served in various positions with that company, including that of Manager of its Atlantic Department with headquarters located at Philadelphia, until July 1, 1918, when upon the formation of the American Railway Express Company I became the General Manager of its Empire State Department located at Buffalo. While holding this position American Railway Express Company formed its Committee on Wages and Working Conditions consisting of five general managers, selected upon a regional basis blanketing the country for the purpose of dealing with labor unions, formulating labor policies and dealing with all questions relating to wages and working conditions of employes, including the negotiating of agreements and handling of grievances arising thereunder

with all labor unions of which express employes might be members. I have been Chairman of that Committee since its inception and that Committee has been continued since Railway Express Agency has been conducting the express business.

In April, 1920, I was appointed Assistant to the President of American Railway Express Company with headquarters at New York still retaining, among other things, general charge of labor relations. I held this position until November 1, 1924. I was then made Vice President, Personnel, with the same general duties and now hold that position with the Railway Express Agency.

During all these years all questions relating to wages and working conditions of employes, labor relations generally and specifically all contract negotiations with labor unions have been under my general charge and supervision. No other office of the Company has been vested with such duty, power and authority.

When the American Railway Express Company started business July 1, 1918, under a contract with the Director General of Railroads to conduct the express transportation business on all Federal controlled railroads for and on behalf of the Director General, the employes of the American Railway Express Company were not organized.

In the latter part of 1919, the Director General of Railroads instructed American Railway Express Company to negotiate and enter into agreements with Labor Unions of which its employes were then members. Such agreements were negotiated and made effective February 1, 1920. Such agreements, as modified either by regulation or by decisions of the United States Railroad Labor Board, remained in effect until February 28, 1929. On March 1,

1929, by written agreement of the respective Labor Unions, the agreements were canceled as to the American Railway Express Company, and were adopted by the Railway Express Agency. I know positively that there never was an agreement existing between American Railway Express Company and The Order of Railroad Telegraphers, and, furthermore, that I, as the responsible officer of American Railway Express Company, consistently declined to recognize the agreement executed between Southern Express Company and its Joint Agents as having any force or effect in so far as American Railway Express Company was concerned. I furthermore declined, at all times, to negotiate with The Order of Railroad Telegraphers, or to regard them as having any right to bargain collectively for the services of such railroad employes, who handled the express business, because of their railroad employment.

In so far as the agreement between Southern Express Company and its joint railroad agents, the American Railway Express Company never assumed that agreement; indeed, on numerous occasions it specifically so advised The Order of Railroad Telegraphers and its responsible officers. In a proceeding before the United States Railroad Labor Board, February 15, 1926, Docket 4624, I so testified at length:

"Now, reverting for a moment to this contract which existed with the Southern and Adams Express Companies, I am not familiar with the origin of that, because my connection with the express business at that time was with the American Express Company and not with the Southern or Adams. I know the American Company had no such contract and I also know that when the old companies went out of business on midnight, June 30, 1918, the American Railway Express Company succeeded them as the agent of the Director General of

Railroads on the various lines formerly covered by these old companies.

"Now, we did not renew that contract. Contracts of every other nature or, I will say, every contract that we did take over, such as leases and railroad contracts and things of that sort, we had those assigned by the three parties. If it was the case of a lease, the lease was assigned by the old express company, the retiring express company, to the American Railway Express Company, accepted by the American Railway Express Company and consented to by the landlord, which is the proper method of transferring a contract.

"We did not absorb the old express companies in the sense that we succeeded to their assets and their liabilities. We merely succeeded them in the handling of transportation on the several lines of railroad, under our arrangement with the Director General of Railroad, and we purchased such of the property of the old express companies as we could use, and we took over such of their leases covering property that we needed, but wherever we took a lease or a contract of any nature there was a formal contract drawn up and signed by all of the parties to it.

"It is true that the old commissions established under those contracts were continued, and it would have been unthinkable that the situation could be otherwise. The mere fact we continued those rates does not mean anything. We continued the salaries. We continued the rates of commission every place just as they were. We took the business of these other companies as a going concern and kept it going, but we did not increase or decrease the commissions in the southeast or any part of the country. We continued those commissions and in a

very large way we continued to pay those rates today, but it is no more true of the southeastern section of the country than it is of New England, if you like.

"As a matter of fact under the Director General we would not have any authority either to increase or decrease those rates, except with the consent of Mr. McAdoo, but we never did assent to the assumption of that contract, and when we were asked to revise it so notified the organization."

There can be no doubt that American Railway Express Company never assented to the assumption of this contract, and it is equally true that when the Railway Express Agency succeeded the American Railway Express Company, no such contract was made a matter of transfer by American Railway Express Company to the Railway Express Agency, nor did Railway Express Agency assume such or any obligation arising under it, nor has Railway Express Agency ever entered into any agreement with The Order of Railroad Telegraphers, but has consistently and continuously declined to do so.

The reason why the American Railway Express Company and the Railway Express Agency have declined to negotiate a contract with The Order of Railroad Telegraphers is that these railroad agents, who serve as agents of the express company, are not employes within the meaning of the Railway Labor Act, and that no contract properly may be made with them under the provisions of the Railway Labor Act, and relating to rates of pay, rules and working conditions. This is in accordance with the view which I have repeatedly expressed to the officers of The Order of Railroad Telegraphers, and over a long period of years, including a letter written to General Chairman Lewis, on October 6, 1925, copy of which

is hereto attached, made a part hereof, and marked "Exhibit A".

L. R. GWYN.

Sworn and subscribed to before me this 11th day of December, 1936.

JAMES F. GUYRE,
Notary Public, Westchester County, Cert. Filed N. Y. Co. Clk's No. 339, Reg. No. 7-G 176, Cert. Filed Bronx Co. Clk.'s No. 19, Reg. No. 107-G 37, Cert. Filed Kings Co. Clk.'s No. 25, Reg. No. 7160.

(Seal)

216 "EXHIBIT A".

American Railway Express Co.

Committee on Wages and Working Conditions.

65 Broadway, New York.

October 6, 1925.

C-822

Mr. B. C. Lewis, General Chairman,
The Order of Railroad Telegraphers,
Oakland, Md.

Dear Sir:

Referring to your letter of September 9th replying to mine of January 14 and 18th, 1924:

It is far from our desire that there should be any misconception of our position with respect to the matters that

you mention. Therefore, I shall try to make our position more clear.

In the first place, there is no unwillingness to meet with you or any other responsible officer of your organization, or anyone else, to discuss anything that may be of interest to us in the conduct of the express business.

I may be wrong but I have regarded your previous letters not in the light of discussing questions of mutual interest, but rather that you wished to negotiate with us an agreement applying to railroad employed agents. Our position in that respect is as previously set forth, namely, that we do not believe that the matter of railroad agents handling express matter is a proper one for negotiation between this company and any organization.

Our unwillingness to negotiate is not because of doubt as to the responsibility of your organization, nor of the character of the railroad agents involved. As you know, railroad agents have for many years—long before you and I were born, acted for the express company on a commission basis, and, so far as I know, the relations between such agents and the express company have always been amicable and satisfactory.

Our exchange of letters has to do with a radically different situation. You are asking the company to enter into a contract with your organization regarding the services of these agents. So far as I can see, these agents are not in position to contract out their services.

To get down to particulars, our correspondence has had to do with agents on the B & O Railroad. So far as I can see, these Agents are employes of the railroad. I recognize that they handle express for this company for which we pay them commissions. This, I think, is a very good thing for the agents, and I think it has always been a very good thing for them, but when it mes to negotiation between such agents and this company for this service it seems to me that you should bear in mind the

fact that these agents are not free to contract out their services in this respect.

In short, our feeling is that the agents on the B & O railroad are primarily employes of that railroad. With the consent of the railroad they can undertake to handle express business, but this does not imply that your organization, in addition to representing them respecting their railroad organization, in addition to representing them respecting their railroad employment, may insist upon representing them as to this express activity.

Please be advised there is no unwillingness on my part to meet with you or anyone else who may desire to see me with respect to this question. My only desire is that you shall understand our viewpoint respecting it. What I am emphasizing is that we cannot undertake to negotiate with respect to employes of some other carrier.

These railroad agents are inducted into service by the railroad company and promoted and disciplined by them. Their employment in railroad service is their source of livelihood. They owe their allegiance to that employer and we cannot figure out how they can collectively bargain out their services to someone else.

Our practice has been to make such arrangements with agents as are mutually advantageous and acceptable. Such an agent is, of course, limited in what he can undertake to do by reason of his railroad employment, nevertheless this situation has existed for many years, and, so far as I know, these arrangements with the various agents have been satisfactory to them and to the company. Hence, there would seem to be no present necessity of stirring up a situation that has existed for over fifty years. In fact, I shall go further in stating that in my estimation such an activity is ill advised and will finally prove unsatisfactory alike to the public, the agents, the express company and the railroads.

I think that you misunderstand the situation and our position regarding such. However, you will understand from this that I am perfectly willing to meet you or anyone else with respect to this situation, or any other situation that concerns the express business—the only limitation that I place upon such a meeting is that you will not regard it as being a negotiation on our part with respect to railroad employes. We are perfectly willing, and always have been, to negotiate with responsible representatives of our employes or to confer with anyone on any matter of mutual interest, but we do not want to be placed in a position of having seemed to negotiate with some organization where our conviction is that no such negotiation with us is proper.

Yours very truly,
(Sgd.) L. R. GWYN,
Vice President.

218 "EXHIBIT No. 11."

Before the National Railroad Adjustment Board, Third Division.

The Order of Railroad Telegraphers
versus In Docket TE-247.
Railway Express Agency, Inc.

Oral Argument of the Order of Railroad Telegraphers.

Upon hearing before the Third Division, and further hearing before the Division with the referee sitting as a member, the contentions of the respondent carrier, that:

a. The complainant joint agents are not employees of the Railway Express Agency.

b. The contract of agreement between the joint agents and the Southern Express Company of August 1, 1917, is not an agreement to which The Order of Railroad Telegraphers is a party, and that, therefore,

c. The Order of Railroad Telegraphers may not maintain a proceeding before this Board based upon such a contract,

were not sustained by the Board in Award 298, which held that The Order of Railroad Telegraphers was within its rights in hailing the Railway Express Agency before the Board, and directing the case be heard on its merits.

The Board, in its preliminary Award 298 in this Docket, on the question of jurisdiction as raised by the respondent, decides that the contract of agreement of August 1, 1917, was an agreement between The Order of Railroad Telegraphers and the Southern Express Company, which was in turn assumed by the American Railway Express Company and the Railway Express Agency, Inc., and is now in effect, not having been terminated by the ex parte action of the respondent in arbitrarily changing the commission rates and transfer salaries as established by the agreement.

The respondent, however, still contends in its response to the Board in the present hearing on the merits in the case, that the agreement of August 1, 1917, with the Southern Express Company was never assumed by the American Railway Express Company, and, therefore, could not have been assumed by the Railway Express Agency, Inc., and was not so assumed.

In reply, we call attention to the recorded facts in the transfer of operation of the express transportation busi-

ness from the Southern Express Company to the joint operating company (the American Railway Express Company) for the period of Federal control and thereafter, as contained in the agreement (see Employees Exhibit "J") between the Director General of Railroads and the four principal express companies of which the Southern Express Company was one, the fourth clause, page 3 of which, provided:

"The Express Companies further agree that they will, without additional compensation, assign, transfer and turn over to the said new corporation as of July 1, 1918, all leases, contracts or agreements relating to their express transportation business in the United States, except contracts for express privileges with railroads or systems of transportation now under Federal control,"

which can have no other meaning than that the contract of agreement of August 1, 1917, was one of the contracts or agreements relating to the Southern Express Company's express transportation business which was thus assigned, transferred and turned over to the new corporation, the American Railway Express Company, and, thereafter, maintained by it. The respondent asserts that the Southern Express Company continued to be, and still is, a corporation; but it is clearly indicated, as supported by Court decisions which we have previously cited, that it ceased as an operating transportation corporation upon that function being taken over by the incorporated American Railway Express Company.

The terms and conditions covering the transfer of the American Railway Express Company to the agents for the participating railroads, and by them to the Railway Express Agency, Inc., in relation to the contract of agreement of August 1, 1917, as recorded with the Interstate Com-

merce Commission and shown in its volume 150, beginning on page 423, provided that:

"The agents will liquidate and settle the accounts of the express company outstanding on February 28, 1929, arising out of the express company's business during the uniform express contract and the amended uniform express contract periods, *assuming and paying all liabilities, whether recorded or unrecorded,* and defending or settling all claims, demands and suits growing out of such business for the purpose above stated, the express company will transfer to the agents all contract assets and contract asset accounts existing on February 28, 1929." (Italics is ours.)

We contend, that under that agreed provision in the taking over of the express transportation business of the American Railway Express Company as conducted on the Seaboard Air Line Railway, the Railway Express Agency, Inc., assumed the liabilities of the contract of agreement of August 1, 1917, *whether recorded or unrecorded* with the agents for the participating railroads in the taking over of the express transportation business of the American Railway Express Company.

We contend this record confirms our position that the agreement of August 1, 1917, was required by the Director General to be delivered over by the Southern Express Company to the American Railway Express Company, and that the American Railway Express Company in turn required the agents for the participating railroads to take over this contract and assume its liabilities which were in the form of agreed commission rates and transfer salaries payable to the joint agents on the Seaboard Air Line Railway for express service performed by them. The statement of the respondent that:

"Neither the American Railway Express Company nor the Railway Express Agency ever had any agreement with The Order of Railroad Telegraphers, and that the agreement of the Southern Express Company with its joint agents never was assigned by the American Railway Express Company or the Railway Express Agency,"

is not in point, in view of the recorded facts of the transfers of the express companies. Whether The Order of Railroad Telegraphers, as constituted on the Seaboard Air Line Railway, may have been so advised by the Railway Express Agency, subsequent to the initiation of this dispute, has no meaning or effect in this dispute.

What the American Railway Express Company may have said to a local representative of the organization on the Baltimore & Ohio Railroad in 1925, or in any other year, has no application or force upon the contract of agreement that was in effect between the organization and the express company operating on the Seaboard Air Line Railway. That agreement provided the procedure only by which changes in rates would be made; it reads:

"Article 14. No change will be made in the foregoing articles until after notice of thirty (30) days, in writing, has been given."

but this agreed procedure was not followed by the Railway Express Agency when it arbitrarily reduced commission rates and transfer salaries of the joint agents on the Seaboard Air Line Railway in 1930.

The issue of negotiating an agreement with the American Railway Express Company on the Baltimore & Ohio Railroad in 1925, referred to by the respondent, was not carried to a conclusion, otherwise the situation on that

railroad would be in a different status today. The argument advanced by that express company to our committee on the Baltimore & Ohio in 1925 to indicate why it would not negotiate an agreement for the joint agents on that property, is the same illogical and unsound argument the presently employed express company presents to this Board in the instant case; that is, that it makes no agreements with The Order of Railroad Telegraphers for joint agents on the assumed grounds the joint agents are not its employees, that the express company cannot promote them in its service, and can assign them no seniority, etc. Despite those assertions by the Railway Express Agency, the fact exists that a similar express company—the Southeastern Express Company—maintains contracts of agreement with The Order of Railroad Telegraphers on twenty railroads on which it operates in the south and southeastern territory of the United States, and with the Canadian Pacific Express Company in Canada on the Canadian Pacific Railway. These agreements are similar to the agreement of August 1, 1917, on the Seaboard Air Line Railway in establishing commission rates on express shipments, c. o. d. collections, money orders, minimum commission amount, and transfer salaries; and make no pretense whatever, nor is it intended they shall, to provide seniority as an express employee or promotion basis, a fear expressed to this Board by the Railway Express Agency in the initial hearing on this dispute, that such would be the case if agreements were entered into with this organization for joint agents. Promotion and seniority of these employees, also in the service of the rail company, is sufficiently taken care of, and for all purposes, by the contract of agreement of the committee with the rail company.

In Part 11 of the respondent's reply, the carrier discusses the arbitrary reduction in the carload commission

rate it enforced upon the joint agents, and endeavors to justify its action by calling attention to an alleged specifically reserved right by the Seaboard Air Line Railway to handle the transportation of carload shipments of perishable freight in refrigerator cars, and that the express companies did not conduct, or have the right to conduct, that business over the lines of the Seaboard Air Line Railway until the season of 1929-30 when the rail company was required to transport carload shipments of perishable freight in refrigerator cars, and sets up this additional business as the reason for its arbitrary action in reducing the carload commission rate to the joint agents who are the complainants in this dispute.

Let us examine the factual record as to these statements. The agreement made June 26, 1918, between the Director General and the American Railway Express Company, employing the express company as the sole agent for the Government to conduct the express transportation business upon all lines of railroad under Federal control, including the Seaboard Air Line Railway, contained the following exception proviso in Article III:

"That nothing in this agreement shall prevent the Director General from transporting horses, carriages, or cattle, or other classes of freight upon passenger trains when in emergencies to avoid delay to freight shipments."

Upon the complete termination of Federal control, the American Railway Express Company entered into the "Uniform Contract for Express Operations Over Rail Lines" with all railroads over which it operated, including the Seaboard Air Line Railway, which contract in Article I, contained the following exception proviso:

"That where, as of December 27, 1917, the Rail Company was by contract, understanding or practice entitled

to the exclusive or joint right to handle any particular commodity upon passenger, mail or express trains, the Rail Company hereby reserves such exclusive joint right as to such commodity under this agreement."

This Uniform Contract was succeeded on March 1, 1923, by what was termed the "Amended Uniform Contract for Express Operations Over Rail Lines", which amended contract contained the same identical exception proviso as to carload shipments.

Coming down now to the "Express Operations Agreement" executed between the Railway Express Agency, Inc., and all rail companies over which it is employed as the sole agent to conduct the express transportation business, including the Seaboard Air Line Railway, consecutively effective as of March 1, 1929. This Express Operations Agreement contains the following exception under Article II, Section 2-(b):

"Where the Rail Company serves written notice upon the Express Company of its election to suspend the agency of the Express Company to transport property in carload shipments, as defined in Section 1 of Article V hereof, in which event and unless and until such election shall be revoked the Rail Company may move such carload shipments in its passenger, express or mail trains independently of the provisions of this agreement."

From this record it may readily be understood by the Board that the right which the Seaboard Air Line Railway is alleged by the express company to have specifically reserved to itself to transport carload perishable freight was in fact a national right reserved by all rail companies through the Uniform Express Contracts to handle or not to handle carload perishables in their fast train

service, and that the Seaboard Air Line Railway merely exercised that right by election, under the Uniform Contracts, in the same manner certain other railroads are now doing.

The express company states that upon the handling of carload perishable shipments out of Florida being transferred from the Rail Company to it, that consideration was given to the arrangement for handling such shipments from points like Lawtey, Florida, where the express business was handled by a joint railroad-express agent, and found the application of the established commission rate on carload shipments would be improper and lacking in equity as it would result in paying the agent what, in its opinion, would be an exorbitant amount per carload, and that it thereupon approached this individual agent with the proposal that a rate of $5.00 per carload would be commensurate and comparable to that paid in other parts of the United States for such service, and if not accepted, a separate express agency would be established at this point.

Mr. L. R. Gwyn, representative for the express company in this dispute, testifies in response to this Board that he has served the various express companies in the United States for many years and that when the American Railway Express Company was formed, he served as Chairman of the Committee on Wages and Working Conditions during the existence of that company, and that in his present position of Vice President for the Railway Express Agency he has the same general duties in charge of labor relations. On December 2, 1922, Chairman Gwyn issued a letter of instructions to all superintendents of the American Railway Express Company on the subject matter of established commission rates paid joint railway-express agents, which read in part as follows:

"2. So far as specific changes are concerned there is no reason why we cannot do as we have always done when it is desirable to make a new arrangement with a joint agent; propose, confer with him, and agree to such new arrangements, however, where our business is large enough to consider establishing an exclusive agent, or otherwise making an arrangement with some one other than the agent, *there is less difficulty in getting the agent's consent;* but in cases where they will not consent we would, of course, have to invoke the assistance of the railroad in which case, as I see it, the railroad would then have to handle the matter." (Italics ours.)

This policy of bringing pressure to bear upon the individual agent whenever the express company desired to arbitrarily reduce the established commission rate at any joint railroad-express agency has evidently been continued by the Railway Express Agency; because that was the method used upon the agent at Lawtey resulting in the individual agreement to handle carload shipments at less than the rate established by the agreement of August 1, 1917, and explains that part of this agent's (Dinkins) letter of agreement of November 29, 1929, quoted in the carriers response and reading:

"The position of the express company on the matter of express commissions on car lot shipments was outlined to me today and I am agreeable to accepting $5.00 per car on such shipments." (Italics ours.)

Here we find the express company not only acting in violation of the express agreement of August 1, 1917, by bargaining individually with an individual agent, but also discloses the express company as setting itself up as a chancellor in deciding for itself what rate would be equitable. Such a procedure may be termed nothing less

than intimidation. To cause a person to accept a proposition by intimidation certainly would not be upheld in any Court of equity. We contend that the individual agreement secured by the express company from Agent Dinkins, or any other agent of the SAL, is invalid and should be treated by this Board as of no value and as if never made. To do otherwise would destroy the very essence of collective bargaining which these agents have exercised for many years, not only with the railway company, but with the express company, as evidenced by the express agreement of August 1, 1917, which to repeat the opinion of the Referee in preliminary Award 298, in this case:

"operated with all the force and effect of a regular agreement from its inception, until April 1, 1930, when it was terminated, if at all, by the exparte action of the Railway Express Agency, Inc."

However, the express company was evidently not content with the result of its individual negotiations with agent Dinkins at Lawtey, Florida, because we find it arbitrarily reduced the commission rate to $5.00 on car lot shipments at Lawtey, effective April 10, 1930, as will be noted from the following photostat copy of letter of March 25, 1930, written by Superintendent A. B. Scruggs, of the Railway Express Agency to agent Dinkins.

(Same as letter bearing same date written by Scruggs to Richards and set out as "Exhibit 3-E" hereof.)

It will be noted from this letter by Mr. Scruggs, that he *admits there was an established commission rate in effect for carload express shipments*, but that due to bad bargain with the rail company absorbing 85% of the gross revenue on carload shipments, the commission was arbitrarily reduced to $5.00 at the Lawtey agency effective

April 10, 1930. The result of the bad bargain with the rail company was thus, in part, passed on to the express employee. If Agent Dinkins had agreed individually on November 29, 1929, as the respondent alleges, to accept a rate of $5.60 per car, why did the express company find it necessary to arbitrarily reduce the rate to $5.00 some four months later to the same agent? The only plausible explanation we can offer is that the conditions imposed in agent Dinkins' letter of November 29, 1929, were not acceptable. If the conditions were acceptable, as the respondent would have them believe, then why their later arbitrary action in attempting to attain the same end?

The letter of Superintendent Scruggs of March 25, 1930, substantially supports our contention that the reduction in the agreed commission rate as applicable to carload express shipments was arbitrarily established by the express company, and is a definite admission that a higher rate was in effect. The higher rate that was in effect is the rate established by the express agreement of August 1, 1917.

If the express company felt that the commission rate for carload shipments as established by the express agreement of August 1, 1917, was improper or inequitable, and if the express company had any intention whatever to proceed in an orderly manner in the matter and in accordance with the provisions of the Railway Labor Act, it had proper and free opportunity to negotiate an appropriate rate with our committee under Article 14 of the express agreement, which agreement, as is stated in its preamble, governs the rules and rates of pay of the express company's agents who are jointly employed as railroad and express agents.

Even though the express agreement may not have existed, the method used by the express company in enforcing a change arbitrarily, or by individual bargaining, was improper and is frowned upon by this Board in Awards 181, 218 and 297 in that light by ordering restitution of the established rate which had been reduced in like manner because there rests in the schedule agreement between this committee and the Seaboard Air Line Railway, an additional safeguard over the thus established commission rates which is set forth in Rule 30 of said agreement, reading as follows:

"Where the express or Western Union business is removed from or created at any office, thereby reducing or increasing the average compensation paid to any position, prompt adjustment of the salary affected will be made conforming to rates paid for similar positions."

which rule, this Board has interpreted in Awards 181, 218 and 297, as sufficiently protective against arbitrary changes in commission rates by the express company, the rail company, or by both acting jointly.

The express company in illustrating what it terms the absurdity of paying express commissions on the new carload traffic at the same rate as on l. c. l., states the commission on a carload from Lawtey to New York at the rate of 10 per cent would be $49.64. It further states that in the year 1929, the year prior to these carload shipments being handled by the express company, agent Dinkins was paid $1,734.44 in commissions. Accepting the latter statement as correct, the commission rate on carload shipments payable to agent Dinkins for the year 1930 was 7 per cent, not 10 per cent as stated by the express company; and a carload to New York would have $34.72 instead of $49.64 as stated by the express company. This

is substantiated by the fact that the express agreement of August 1, 1917, stipulates that commissions on total business received and forwarded, based on previous year business, would be paid as follows:

"When commissions exceed one hundred dollars per month, seven per cent."

and as agent Dinkins at Lawtey earned more than one hundred dollars per month during 1929, the rate for the year 1930 was 7 per cent, and not computed at 10 per cent as stated by the express company.

The respondent states on page 5 of its response, that the basis of compensation it used in affixing the arbitrary reduced rate of $5.00 per carload shipment, is comparable to that paid in other parts of the United States where handled under refrigeration by express. It certainly does not compare with the schedule rate paid in the same territory by the Southeastern Express Company, whose rates on roads on which it operates are the same as those established by the express agreement of August 1, 1917, on the Seaboard Air Line Railway. A reference to carload commission rates paid on other roads in the United States by the Railway Express Agency may be illuminating to the Board in showing the fallacy of the basis the express company alleges it used for comparison.

A survey, just made by the organization on 62 railroads in the United States, show that on 36 of the railroads a higher established commission rate than $5.00 per carload express shipment is paid joint agents. The remaining 26 railroads in this survey on which but $5.00 per carload is paid the joint agents, are not, for the most, comparable with the size and importance, or territory served by, the Seaboard Air Line Railway.

The respondent states that prior to 1930 the express companies did not conduct, or have the right to conduct, the business of transporting carload shipments of perishables in refrigerator cars over the lines of the Seaboard Air Line Railway. Lest the Board may gather from this statement that carload shipments of any commodity were not transported by the express companies (including the Railway Express Agency) over the lines of the Seaboard Air Line Railway prior to 1930, we wish to point out that such was not the case. The express companies operating on the Seaboard Air Line, beginning at least with the Southern Express Company and including the Railway Express Agency, did transport commodities in carload shipments from and to any and all stations on the Seaboard Air Line where joint railway-express agents were located, prior to 1930, with the possible exception of berries out of Florida, and that the joint agents were paid the commission rate on such carload shipments as established by the express agreement of August 1, 1917, and continued to be paid at the rate until April 1930, when the Railway Express Agency arbitrarily reduced the rate to $5.00 per car to all agents on the entire system, including Lawtey, as will be noted by Employee's Exhibit "E" of our submission, regardless of the nature of the commodity transported. Express tariff rates filed with the Interstate Commerce Commission by these several express companies prior to 1930, including the Railway Express Agency, will show that tariff rates on carload shipments by express on all commodities were in effect on the Seaboard Air Line Railway.

We have shown by Superintendent Scruggs' letter of March 25, 1930, that the commission rate on carload shipments at Lawtey, Florida, was arbitrarily reduced by the respondent, effective April 10, 1930, during which month the commission on carload express shipments was likewise

arbitrarily reduced at all joint agencies over the entire railroad on any and all commodities, and not solely in Florida on berry shipments. Exception to this may be noted at Lawtey, Florida, at which the commission rate on carload express shipments of berries was reduced on 35 carloads shipped during February, March and to April 9, 1930, on the basis of the improper individual agreement made by the individual agent with the Railway Express Agency, which should be included in our claim for restitution of the difference in rate, and at any other agency in Florida where similar individual agreement may have been made prior to the system reduction arbitrarily made in April, 1930.

To clarify. There were two distinctly different ex parte methods employed by the respondent in reducing the commission rate on carload shipments, involved in this dispute, namely:

1. By individual bargaining with the individual agent at offices in Florida beginning with the berry shipping season of 1930.

2. By arbitrary action at all offices on the entire system on all commodities beginning on or about April 10, 1930.

all of which were executed in violation of the express agreement of August 1, 1917.

The express company, in 1930, admittedly reduced the schedule commission rate on carload shipments paid all joint agents on the entire system of railroad, reduced the schedule minimum monthly amount of commission at certain agencies, and reduced the schedule monthly transfer salaries (or higher rates) at certain agencies, by ex-

parte action, and endeavors to justify its action on the basis that the established rates and salaries were too high. We are not concerned, and the Board should not be concerned, whether the rates or salaries were excessive. The rates and salaries were established by the contract of agreement of August 1, 1917. The Board should be concerned only with the manner in which the changes were accomplished. The changes were accomplished by individual bargaining and by ex parte action of the express company in violation of the express agreement, and that should dispose of the case favorably to our complainants.

The express carrier reiterates on page 13 of its response that the contract between the Director General with the American Railway Express Company during Federal control, provided for the payment of express commissions directly to the Director General, but by his subsequent order the commissions were paid to the joint agents as theretofore.

We have previously pointed out to the Board in the jurisdictional hearing in this case of dispute that, the provision in the Federal control contract (see Article XV of same) for the payment of express commissions direct to the Director General was predicated entirely upon the further provision in the same Article of the contract that:

"Where station agents of the Director General or of the railroad are employed by the Express Company, *the Director General shall pay such agents the entire compensation for their services to the Director General, the railroads, and the Express Company*, and no payment shall be made direct by the Express Company to any such agent whose service may be so furnished by the Director general." (Italics ours.)

Had the commissions been paid direct to the Director General the amount thus received would in turn have been paid over to the agents by the Director General in the amount they had earned at the established commission rate for handling the express business. This, the Director General found impractical to carry out and he left the method of payment of express commission as he had found it—that is, paid to the agents direct by the Express Company, which action nullified the provision of the contract on which so much stress is placed by the Railway Express Agency as prohibiting the American Railway Express Company from inheriting our express agreement of August 1, 1917, and its liabilities. While the Railway Express Agency continues to assert that there was no agreement of any kind as to the rate of commissions to be paid the Seaboard Air Line joint railway-express agents, it admits the American Railway Express Company continued for the time being to pay the same rate of commissions which had previously been in effect under the express agreement of August 1, 1917. As a matter of fact, the rates of commissions established by the express agreement of August 1, 1917, were continued in effect by the American Railway Express Company throughout its existence and by the Railway Express Agency until the Railway Express Agency arbitrarily reduced these rates in the year 1930.

The Express Company states further, on page 14 of its response, that:

"Generally speaking, there has been no change in the rates of commissions paid to joint railroad-express agents during the period of operation by the American Railway Express Company and by the Railway Express Agency."

but admits in a few instances where conditions have changed the rate of commission has been revised. So far

as we have record, such revision has always been downward and by ex parte action of the Express Company. The Express Company, however, cites this as its policy and in justification of its ex parte action in causing the agent at Rutherford, Alabama (cited in our statement of facts) to enter into an individual agreement with it, to handle the l. c. l. express business at his railroad station at less than the express schedule minimum rate. Whether a lesser rate was justified at this station is irrelevant to the subject matter of this case of dispute. The Express Company admits it individually negotiated with the individual agent a lesser than the established rate—that it made no effort to negotiate either under or outside of the agreement of August 1, 1917, with the organization authorized to represent this and other agents on the Seaboard Air Line in these matters. The agreement of August 1, 1917, provided to the Express Company an open method of handling such matters with our Committee —but it preferred to ignore that agreement and violate the process of collective bargaining established by Federal law where an organization has been chosen by the employees to represent them on matters pertaining to their compensation and working conditions. And the Express Company goes on to admit it has taken like action at other agencies in the Seaboard Air Line in the same situation which support our statements that such ex parte action was taken by it at Rutherford, and other joint offices on the railway.

Again at junction points such as at Moncure, North Carolina, which we cite in our submission, the Express Company admits it took similar ex parte action with respect to the transfer salary paid the agent by individually bargaining with the individual agent a lesser salary for a period of four years, for transferring express matter, than the amount in effect and established by the agreement of August 1, 1917. And here again the Express carrier had

open to it the same lawful procedure of negotiating with the chosen representatives.

As to the reduction made by the express company in the amount of transfer salary paid the agent at that point. The express agreement of August 1, 1917, established an agreed monthly minimum of $10.00 for such service. The carrier states that in 1932, the volume of transfer matter dropped to a low level, and the agent then located at this station individually agreed to accept a reduction to $5.00 per month, but when business increased the rate was restored to $10.00 in June 1936. If the individual agreement with the agent were to be considered proper, but which this Board in numerous awards has found is not permissible, it could only apply while the individual signing the individual agreement remained on the job. Let us see what was actually done by the express company, which is typical of its methods.

We here reproduce a letter from Agent B. J. Weathers, who became agent at Moncure on August 7, 1933, or one year later:

Moncure, N. C., December 20, 1936.

Mr. R. F. Thompson, General Chairman,
Order Railroad Telegraphers,
Rochelle, Ga.

Dear Mr. Thompson:

Your letter December 16th, asking if I had agreed with the Railway Express Agency to reduce the compensation for transfer service to $5.00 per month. No, I have not agreed to any reduction whatever at any time.

I was checked in as agent here April 7, 1933, at which time the Express Company was paying five dollars per month for the express transfer service. I later heard the

transfer had formerly been rated at $15.00 per month, but I did not know what had happened to reduce it to $5.00, so I took the matter up with Mr. White, Route Agent, Norlina, N. C., requesting the restoration of the old rate. Finally, in June 1936, authority was granted to increase the transfer allowance to $10.00 per month.

Now, it is possible that some former agent here agreed with the Express Company to reduce the transfer allowance to $5.00 per month. If so, I don't see that has anything to do with my case because, as I understand it, only the ORT has the right to negotiate changes in rates of pay. Certainly no former agent had the authority to agree to a reduction that would be applicable to me.

Yours very truly,

(Signed) B. J. WEATHERS,
Joint Agent—Railway Express Agency—Seaboard Air Line Railway.

From agent Weathers' letter it will be noted that the express company arbitrarily continued the individually bargained rate with the succeeding agent who had made no agreement. Had not the succeeding agent at Moncure insisted upon being paid the schedule rate of transfer salary it is probable the schedule rate would not have been restored in June 1936, or at all.

What took place at Moncure in reducing the transfer salary below the schedule monthly minimum, also took place at other transfer points, either by individual bargaining or by arbitrary action of the respondent.

We are asking that all transfer salaries paid the joint agents, as established by the agreement of August 1, 1917, or higher rates which may have been in effect, which have been reduced through individual bargaining or by arbi-

trary action of the respondent, shall be restored retroactively to the date thus reduced. We strongly contend that ex parte action and individual bargaining where collective agreements are in effect are highly improper, should not be made and should not be recognized where made, as such action is unlawful, not being in accord with the meaning and intent of the provisions of the Railway Labor Acts, and destructive of collective agreements; and in this we feel we are amply supported by this Board in awards on other similar cases.

* * *

A schedule agreement existed between the Southern Express Company and The Order of Railroad Telegraphers in behalf of the joint railway-express agents on the Seaboard Air Line which was last revised August 1, 1917. It existed when the operating company—the American Railway Express Company—operated the Southern Express Company during Federal control as the agent for the Government. The agreement was fully observed by the operating company and by the succeeding company following the termination of Federal control—the American Railway Express Company created by the consolidation of the four express companies, including the Southern Express Company. The agreement of August 1, 1917, as we have shown, has not been abrogated, or modified in any degree, by the parties to it or their successors.

The successors to the Southern Express Company—The American Railway Express Agency, and in turn the Railway Express Agency—took over all of the assets of the Southern Express Company, and with it took over the agreement of August 1, 1917, (because it was never abrogated) and the liabilities of the agreement. We feel we have conclusively shown in our testimony before this Board in hearing on the question of the Board's jurisdic-

tion, that all agreements of the Southern Express Company, except agreements with railroads, whether recorded or unrecorded, were agreed to be taken over by each of the succeeding express companies down to and including the Railway Express Agency. We feel that the testimony and argument we submitted the Board in the previous hearing on the Board's jurisdiction in this case is suitable in our argument on the merits of the case, and to avoid over-burdening the Board with a duplication of our previous testimony and argument, we ask that all of it thus submitted shall be made a part of the record in the case as now heard and be considered by the Board in its determination of final award.

The referee in Award No. 298, on this case of dispute, found that:

"it is not possible to uphold disclaimor of respondent for obligation to maintain the rate of commissions, in the light of an instrument which, over a long period of years, was mutually regarded as an agreement by the joint agents and the Southern Express Company and its successors, and which specified definitely how it could be terminated. The instrument has all the earmarks of being an agreement in respect to an employer-employee relationship. Without challenging any of the legal citations advanced, there would appear to be grave doubt whether a relationship which has continued over a long period of years under an instrument which to all intents and purposes is an employer-employee agreement and which contains specific stipulation for its termination, can suddenly be arbitrarily relieved of the attributes of an employer-employee relationship, by ex parte action."

There was no doubt in the expressed opinion of the referee that the agreement of August 1, 1917, had operated

with all the force and effect of a regular agreement from its inception until the terms of the agreement were violated in April, 1930, by ex parte action of the Railway Express Agency.

Conclusion.

In view of the findings of the Board in Award 298 on this case, and the facts and argument we have submitted on the merits in the dispute, we ask that final Award be found favorable to the claims presented in our ex parte submission.

Respectfully submitted for
THE ORDER OF RAILROAD TELEGRAPHERS,
R. F. THOMPSON,
General Chairman.
SEABOARD AIR LINE RAILWAY,
DISTRICT OF THE RAILWAY EXPRESS AGENCY,
G. E. JOSLIN,
Vice President.

239 "EXHIBIT No. 12."

Before the National Railroad Adjustment Board,
Third Division.

The Order of Railroad Telegraphers,
vs. Docket TE-247.
Railway Express Agency, Incorporated.

Answer to Oral Argument of the Order of Railroad Telegraphers.

The so-called Oral Argument of The Order of Railroad Telegraphers was filed with this Board after it had been

read in full at a hearing held before this Board on April 7, 1937, and is in the nature of a reply to the Response of Railway Express Agency, dated December 14, 1936. We think it will suffice only briefly to answer the so-called Oral Argument which is, in fact, a written pleading, as the contentions set up therein largely are repetitive of points urged and arguments heretofore made by the complainant in this proceeding.

The "Oral Argument" repeats the contention that American Railway Express Company and Railway Express Agency were and are bound by an agreement made in 1917 between the Southern Express Company and its joint agents. We shall not repeat what has been said in our presentation on this point, except to state again that the American Railway Express Company was not a consolidation of the Southern Express Company, and other express companies, and that it did not assume the debts, liabilities and obligations of those express companies. We cited in earlier presentations decisions of the Courts sustaining this view, and while it is true that there were decisions of the Courts holding the American Railway Express Company liable for certain pre-existing debts of one of the old express companies, this was on the theory of fraud, and would and could apply only to past transactions. Even if those decisions were correct, it would not follow that the American Railway Express Company would be liable to continue in effect contracts for the future. The American Railway Express Company was free to assume and take over such contracts as it desired, subject to any inconsistency or objection arising out of the provisions of its contract with the Director General of Railroads for the future conduct of the express transportation business beginning on July 1, 1918.

It did not assume the contract between the Southern Express Company and its joint agents. That contract was

not assigned to or taken over by it and there was, in fact, a provision in the contract between the American Railway Express Company and the Director General of Railroads which would have made it improper and unlawful for it to have undertaken to assume such contract. The contract with the Director General provided that the express commissions earned by joint railroad agents should be paid to the Director General. A contract whereby the American Railway Express Company would have undertaken and assumed to pay those express commissions to joint railroad agents in the amount provided by the contract between the Southern Express Company and its joint agents or in any amount, would have been in violation of the contract with the Director General of Railroads.

We do not question the statement that the commissions subsequently were paid directly to the agents as had been done prior to July 1st, but such action was due to an order of the Director General of Railroads to the Express Company after July 1, 1918, and not by reason of any obligation arising out of, or pursuant to the provisions of the agreement between the Southern Express Company and the joint agents. The Director General of Railroads by order to the Express Company waived the provision of the contract between him and the Express Company requiring the payment of the express commissions to him, and directed the Express Company to pay those commissions to the express agents.

We shall not burden the Board with a repetition of the testimony, or of our previous statements to the effect that the agreement between the Southern Express Company likewise was not assigned to, assumed by, or taken over by, this respondent, Railway Express Agency. It was not in effect when Railway Express Agency was organized and began business. It had not been taken over by the American Railway Express Company, and no obligation had

been assumed by the American Railway Express Company by reason thereof, and, again, we say it was not taken over by the Railway Express Agency, and Railway Express Agency had not assumed any obligations thereunder.

An effort is made to convey the impression that The Order of Railroad Telegraphers were not fully advised of the position of the American Railway Express Company and the Railway Express Agency with reference to the existence of a contract until recently. This is contrary to the undisputed testimony in the record. It is definitely shown by that record that American Railway Express Company and Railway Express Agency repeatedly notified the complainant organization and its officers that no such contract was in effect. Such advice has been provided time and again, orally and in writing.

In the "Oral Argument" an effort is made to question the testimony of the respondent to the effect that it did not have a contract with the Seaboard Air Line Railway Company to handle the transportation of carload shipments of perishables in refrigerator cars under the so-called "Express Operations Agreement" between the Railway Express Agency and the Seaboard Air Line Railway Company, and the prior contracts which the American Railway Express Company had with the Seaboard Air Line Railway Company for the conduct of the express business on its line of railroad. There can be no question as to this. The contracts speak for themselves, but in addition to the sworn testimony we call attention to the decision of the Interstate Commerce Commission in *Transportation of Strawberries by Express, etc.*, 151 I. C. C. 553, in which the Commission stated at page 566:

"No express refrigerator cars are owned by the Coast Line, Seaboard, or L. & N. *Their contracts with the ex-*

press company do not authorize or permit the latter to operate express carload service over their lines." (Italics supplied.)

The claim of the complainant sets forth, as one of the specific instances complained of, the reduction in the commission rate on carload express shipments at Lawtey, Florida, which it contends was reduced arbitrarily, and of which it urges restoration. As shown in the Response, dated December 14, 1936, the change in the rate of commission at Lawtey, Florida, was made by agreement between the respondent and the agent at that point.

The making of an agreement with the agent as to the rate of commissions was in accord with the general practice of the Express Company. Such agreements having been made they are binding alike upon the agents and upon the Express Agency until they have been changed by agreement. The decisions of the Supreme Court of the United States, to which we have called attention, definitely and finally dispose of this question.

The complaint should be dismissed.

Respectfully submitted,
RAILWAY EXPRESS AGENCY,
INCORPORATED,
By ALBERT M. HARTUNG,
Attorney.

230 Park Avenue,
New York, N. Y.

Dated July 2, 1937.

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"EXHIBIT No. 13."

National Railroad Adjustment Board,
Third Division.

The Order of Railroad Telegraphers,
vs. Docket T.E.-247.
Railway Express Agency, Incorporated.

Reply of the Order of Railroad Telegraphers to Answer filed by Railway Express Agency, Inc.

Counsel for the respondent attempts to characterize the oral argument filed by the petitioners as a written pleading and refers to it as "the so-called oral argument". Irrespective of what terminology the respondent might use in characterizing petitioner's statement filed with the Board on April 17, 1937, the fact, nevertheless, remains that the position of The Order of Railroad Telegraphers was sustained in an award rendered herein on September 17, 1936, wherein the Railway Express Agency, Inc., was found to have violated an agreement which had been recognized by the predecessor companies and itself from August 1917, to April 1, 1930.

The record in the case indicates that the parties to the dispute have put forth all of the argument which the facts in the case warranted. The record before the Third Division, including that before the referee was quite voluminous. In fact the entire case was argued by counsel for the respondent express company in appearing before the members of the Third Division alone and again before the referee. An examination of the "Answer" of the respondent indicates that it rests its case upon what it argued originally. No new defense is presented nor is any other evidence offered than that which it introduced previously in the form of affidavits. Such evidence, however, was

found to be inadequate to defend respondent's arbitrary act in violation of the agreement and the majority of the Third Division consistently upheld petitioner's claim.

With these facts in mind, supported by the record, it would be appropriate to label respondent's "Answer" a petition for rehearing. The Board cannot be expected to re-hash the material in this case since the facts as found in the award of September 17, 1936, must be taken as true in the absence of any substantial reason why the award should not in all respects be enforced.

Throughout its "Answer" the respondent attempts to reiterate much of the discussion and argument which had been presented to this Board by respondent on at least two different occasions prior to the rendering of the award on September 17, 1936. It ought to suffice in reply to the "Answer" to say that there is nothing new presented to this Board in the way of a defense to the original petition filed by The Order of Railroad Telegraphers upon which this Board could make a decision in any manner different from that rendered herein on September 17, 1936.

Respondent makes the rather surprising statement in the "Answer" that:

"the American Railway Express Company was not a consolidation of the Southern Express Company; and other companies, and that it did not assume the debts, liabilities and obligations of those express companies."

This is a gross misstatement of fact. We refer the Board to the proceedings before the Interstate Commerce Commission entitled. "In the Matter of the Application for Consolidation of Express Companies, No. 11365", wherein an order was entered December 7, 1920, as follows:

"It appearing, That the American Railway Express Company has duly filed application for approval and authorization under paragraph (7), section 5, of the interstate commerce act as amended by section 407 of the transportation act, 1920, of the consolidation of the express transportation business and properly devoted to that business of the American Express Company, The Adams Express Company, Southern Express Company, and Wells Fargo & Company, and the consolidation of said four companies so far as said business and property are concerned into the American Railway Express Company, a Delaware corporation;

It further appearing, That a full investigation of the matters and things involved has been had and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

And it further appearing, That the public interest will be promoted by said consolidation:

It is ordered. That said consolidation be, and it is hereby, approved and authorized.

By the Commission.

(Seal) GEORGE B. McGINTY,
Secretary."

The respondent asserts that the American Railway Express Company and the Railway Express Agency, Inc., had repeatedly notified the complainant organization and its officers that no contract was in effect between the parties. The American Railway Express Company continued at all times to observe the provisions of the contract of August 1, 1917, and continued to treat direct with

the officers of the organization, petitioner herein, in the handling of grievances or disputes arising out of the contract, and did not at any time, nor has the Railway Express Agency, Inc., notified the organization, either orally or in writing of intention to terminate the agreement of August 1, 1917. Sworn testimony to this effect is included in Employees' Exhibit "M".

Irrespective of the matters asserted in the "Answer" of respondent that it did not assume the contract between the Southern Express Company and its joint agents the finding has already been made by this Board in the award of September 17, 1936, to the effect that "since the agreement of August 1917, was supposedly in force prior to April 1, 1930, we are warranted in assuming that commissions figured in negotiating the wage agreements with agents on this Railway and this fact cannot be ignored in dealing with cases in which commissions are involved".

The award further provided "as applied to the instant case it is not possible to uphold the disclaimer of respondent for obligation to maintain the rate of commissions, in the light of an instrument which over a long period of years was mutually regarded as an agreement by the joint agents and the Southern Express Company *and its successors,* which specified definitely how it could be terminated. The instrument has all the earmarks of being an agreement in respect to an employer-employee relationship * * *. There would appear to be grave doubt whether a relationship which has continued over a long period of years under an instrument which to all intents and purposes is an employer-employee agreement and, which contains specific stipulation for its termination, can suddenly be arbitrarily relieved of the attributes of an employer-employee relationship by ex-parte action."

The award was based upon the record made before the Third Division of this Board, which included a copy of the contract entered into between the Southern Express Company in August 1917 with a Committee of The Order of Railroad Telegraphers in behalf of the joint railway express agents and which agreements the evidence showed was assumed first by the American Railway Express Company and subsequently by the Railway Express Agency, Inc., the respondent herein, and that the obligations contained in said agreement continued to be recognized and assumed until April 1, 1930, when, in violation of the agreement, the Railway Express Agency, Inc., arbitrarily endeavored to fix the new rates of commissions and transfer salaries without first complying with the provisions of the agreement regarding changes in rates of pay, rules and working conditions.

In the present case an agreement was found to exist between the respondent and the duly authorized representative of the joint railway express agents, namely, The Order of Railroad Telegraphers, "long the acknowledged representative of agents in their dealings with the railway", and which agreement was likewise found to have been arbitrarily violated by the Railway Express Agency, Inc.

Aside from the obligation which the agreement cast upon the respondent herein, the Railway Labor Act, as amended in 1934, casts a further obligation on the respondent "to exert every reasonable effort to make and *maintain agreements* concerning rates of pay, rules and working conditions and settle all disputes, whether arising out of the application of such agreements or otherwise * * *" (Railway Labor Act, Section 2 (First) "General Duties.")

The concluding paragraph of respondent's "Answer" rather boldly asserts that the making of an agreement

with the Agent as to the rates of commissions was in accord with the general practice of the Express Company. It was respondent's determination to treat with the joint agents individually and in violation of the agreement which the award found was recognized up to April 1930, which brought respondent's relations with the joint agents within the purview of the Railway Labor Act.

The award of September 17, 1936, having decided the issues involved in favor of petitioner, as the duly authorized representative of the joint agents, it is obvious that for want of any new matter presented on behalf of respondent, the award should be enforced in its entirety and the Board should so order.

The respondent having had a full and complete hearing on all the matters in issue it ought not now to be allowed to again contest the findings contained in the award. An admission by counsel for respondent, in answer to an inquiry by a member of the Third Division, at the last hearing, clearly demonstrated that respondent recognized the award in holding that the agreement of 1917 was in existence, and in full operation until its violation by respondent in April 1930.

A prompt enforcement of the award by respondent would be in harmony with the provisions of the Railway Labor Act. Refusal to recognize the rights of petitioner as found in the award would be to disregard the provisions and ignore the plain purpose made manifest throughout the numerous provisions of the Railway Labor Act, the major objective of which is the avoidance of industrial strife.

A single agreement as to rates of pay, rules and working conditions promotes peace. An attempt to negotiate with or maintain multiple or separate contracts with the individual employees with varying standards would intro-

duce not merely confusion but discord and dissatisfaction. To abide by the award as rendered, is to lessen or eliminate similar disputes and is therefore obviously germane to the fundamental purpose of the Railway Labor Act, the maintenance of industrial peace and a harmonious relationship between the railroads of the country, the Railway Express Agency, Inc., and their employees.

Respectfully submitted,

THE ORDER OF RAILROAD TELEGRAPHERS,

R. F. THOMPSON,
General Chairman, Seaboard Air Line Railway, District of the Railway Express Agency, Inc.

G. E. JOSLIN,
Vice President.

LEO J. HASSENAUER,
Counsel.

* * * * * * * * * *

251

"EXHIBIT No. 14."

Form 2.

National Railroad Adjustment Board.

Third Division.

Order.

To accompany Award. Number 548

Docket Number TE-247

The order and award is the same as "Exhibit A", attached to and a part of the complaint, and is not repeated here.

* * * * * * * * * *

252 "EXHIBIT No. 14-A."

Railway Express Agency
Incorporated.

Suwanee Division,
1212 West Bay Street,
Jacksonville, Florida.

508

U. S. Mail.

December 20, 1929.

A. B. Scruggs,
Superintendent.

Dear Sir:

A new and unusual situation has arisen with respect to express traffic in Florida. The Interstate Commerce Commission in Docket 18187 have ordered the railroad companies in Florida, including the Seaboard Air Line Railway Company, to provide refrigerator car service on specified express schedules from Florida points to destinations in other states. The Railway Company has requested Railway Express Agency, Incorporated, to perform the required service for it.

Under the terms of the Standard Operating Agreement between the Railway Companies, (including the Seaboard Air Line Railway Company) and Railway Express Agency, Incorporated, the Express Agency is required to pay to the railway companies 85% of the gross express revenue on carload shipments, which leaves the Express Agency only 15% of the gross express revenues from which to pay all of the expenses, other than railroad transportation, of handling the carload strawberry shipments in shipping

destination and intermediate points, a good deal of telegraphing, supervision, traffic, accounting and possible claims.

In addition to the regular express charges, there will be additional charges for refrigeration, but those will be to cover the costs of providing refrigeration.

The carload shipments will be shipper's load and count and Shipper's stripping and bracing, thus requiring very much less agency time and work than the handling of ordinary L. C. L. express traffic.

It will be apparent to you that under these circumstances the usual percentage rates of agency commissions cannot be applied. Instead, you will be allowed compensation of $5.00 a car on each carload shipment forwarded from your office, which I am confident you will find a reasonable compensation.

The Seaboard Air Line Railway Company has requested this Express Agency to handle only strawberries from Florida in express refrigerator carload shipments. The rates, rules and regulations governing the same are contained in traffic I. C. C. No. 132, issued November 25th, 1929, effective December 1st, 1929, a copy of which already has been sent you. The traffic does not apply to any commodity other than strawberries.

A carload shipment consists of a car loaded from one consignor to one consignee at one destination, moving under rates which exclude vehicle service.

The compensation of $5.00 a car should be entered in Agent's Commission voucher under the classification of "Commission on Special Revenue as Per Detail on Reverse side" of the Monthly Balance Sheet, form 96-B.

Please acknowledge receipt of this letter.

Yours truly,

.....

Superintendent.

cc—to

Route Agent.

254

"EXHIBIT No. 15."

Uniform Contract for Express Operations Over Rail Lines.

Agreement between ..... and American Railway Express Company.

Effective September 1, 1920.

This Agreement, made this .... day of ..... between ..... hereinafter called the "Rail Company", and the American Railway Express Company, hereinafter referred to as the "Express Company",

Witnesseth, that for and in consideration of the mutual covenants, separate services and payments hereinafter recited to be by the parties kept, performed and made, the parties do hereby agree as follows:

Article I.

Sec. 1. The express transportation business to be carried on under this contract is understood to mean such express transportation business as was commonly carried on by express companies as of December 27, 1917, and for the purpose of this contract it is agreed that the express business contemplated by this contract shall include all matter commonly carried as express on December 27, 1917, on passenger, express, or mail trains of the railroads, except baggage of passengers and theatrical scenery and belongings when handled on regular passenger transportation, United States and railroad mail, and mail equipment, corpses when accompanied by some one in charge, news trunks and property necessary to carry on the usual news

business, also supplies and material for the use of the railroad and its system lines, or for contractors for such railroad or its system lines, and local marketing and package service for individuals on such trains as now exercise that privilege. The Rail Company as well as the Express Company shall have the right to carry on such trains silk and tea from the Orient imported through Coast ports, newspapers, milk and cream, and returned empties; and the Rail Company shall have the right to carry on such trains, equipment, supplies and property owned by any telegraph or telephone company, or by any other person or corporation, or their successors, to whom rights and privileges (other than the right or privilege of operating an express business) have been granted by the Rail Company prior to September 1, 1920; provided, however, that nothing in this agreement shall restrict or limit the right of the Rail Company to operate mixed trains or shall prevent the Rail Company from transporting horses, carriages, or cattle or other classes of freight upon passenger trains when necessary in emergencies to avoid delay to freight shipments; and provided further that where, as of December 27, 1917, the Rail Company was by contract, understanding or practice entitled to the exclusive or joint right to handle any particular commodity upon passenger, mail or express trains, the Rail Company hereby reserves such exclusive or joint right as to such commodity under this agreement; and provided further that no explosives, inflammable articles, or acids shall be considered express traffic except such as it may be lawful to transport on passenger trains when properly packed, marked, and certified to as required by the regulations of the Interstate Commerce Commission or other public authority for the transportation of explosives, by the rules of the American Railroad Association. The maximum weight to be carried in any of the cars carrying express business shall not exceed a limit which in the judgment of the Rail Company is necessary for safety. Articles which can only be loaded and unloaded

through end doors of express or baggage cars, causing delays to passenger trains in switching for this purpose, shall not be accepted by the Express Company unless a special car is furnished and charged for at the carload rate, and the Express Company shall not accept shipments which cannot be so handled as to avoid unusual delays to the trains of the Rail Company. Provided, however, that nothing in this section contained shall be construed to prevent the Rail Company from performing any transportation service covered by a traffic now in force or required by any present or future law.

Sec. 2. Said express transportation business shall be conducted in an honest, efficient and economical manner and under such rates, charges, classifications, rules, regulations, and practices and subject to such limitations and conditions as are now or may hereafter be lawfully established, provided: (a) that, where car-load rates are voluntarily made by the Express Company, the minimum weight shall not be less than at the same time prescribed by the railway companies for freight; and (b) that rates voluntarily made by the Express Company shall not be less than twice the prevailing class freight rate, between the same points, and in no event less than twice the prevailing first class freight rate.

Article II.

Sec. 1. The Rail Company agrees to let and demise, and by these presents does let and demise, to the Express Company, the exclusive right and privilege, so far as the said Rail Company has the legal right to let such exclusive right and privilege to any one party, to control, conduct and transact all the express transportation business over the lines and upon such passenger, express or mail trains of the said Rail Company as may be agreed to, upon the main lines, branches and extensions of all railroads now

or hereafter, during the continuance of this contract, owned or leased, and operated by the Rail Company; but nevertheless subject to the conditions and limitations in this contract contained.

Sec. 3. The Rail Company further agrees that it will not for compensation transport valuables, money, goods or property of any description on its own account, or permit its officers, agents or employees to do so on any of its passenger, express or mail trains, excepting that the Rail Company shall have the right to carry on its own account the articles enumerated in Section 1 of Article I.

Article III.

Sec. 1. The Rail Company shall as soon as practicable furnish space in cars, adequate in number and suitable for use in passenger, mail, or express train service at passenger train speed; said cars to be properly heated and lighted, and lettered "American Railway Express"; and shall transport such cars on such passenger, mail, or express trains as may be, from time to time, necessary to meet the reasonable requirements of the public for express service. The Rail Company shall carry in such cars the express matter, with the safes, packing trunks, and train supplies and equipment of the Express Company, together with the messengers, helpers and guards of the Express Company, necessary for the handling of such express matter to destination or the proper transfer points.

Sec. 2. If special express trains are run by the Rail Company, it shall be without extra compensation to the Rail Company.

Sec. 3. In order that the Rail Company may not be required to run more cars than are necessary, the Express Company shall use the unoccupied space in the baggage and other passenger train cars of the Rail Company to the greatest extent practicable, and the Rail Company shall likewise have the right to use any unoccupied space in any car supplied by the Express Company.

Article IV.

Sec. 1. In cases where an employe of the Rail Company acts as agent for the Express Company, the Rail Company, to the extent that it reasonably can, shall allow the Express Company the use of a portion of the station buildings now existing or that may hereafter be erected, including appurtenances and conveniences, without charge to the Express Company, except as otherwise provided in Section 2 of this Article.

Article VI.

The Express Company shall as soon as practicable furnish adequate and suitable equipment, and shall use its vehicles, property, offices, and other facilities, and its agents and employes in operating an express transportation business on the Rail Company's lines; and in the conduct of said business shall exert itself in all proper ways to make said business satisfactory to the public and to the Rail Company.

Article XVII.

The Express Company agrees that the icing and refrigeration of cars in the service of the Express Company while on the lines of the Rail Company shall be performed by the agency employed by the Rail Company for this purpose for account of the Express Company, the Rail Company agreeing that the charges for such service shall be reasonable.

* * * * * * *

Article XX.

This agreement shall take effect on the First day of September, 1920, and unless sooner terminated, as hereinafter provided, shall continue in force until midnight the Thirty-first day of August, 1925, and thereafter until the expiration of four months' notice in writing by either party to the other, such notice not to be given before the Thirty-first day of August, 1925.

* * * * * * * * *

261 "EXHIBIT No. 15-A."

Amended.

Uniform Contract for Express Operations

Over Rail Lines

Agreement between ..... and
American Railway Express Company.

Effective March 1, 1923.

This Agreement, made this .... day of ....., between ....., hereinafter

called the "Rail Company," and the American Railway Express Company, hereinafter referred to as the "Express Company,"

Witnesseth, that for and in consideration of the mutual covenants, separate services and payments hereinafter recited to be by the parties kept, performed and made, the parties do hereby agree as follows:

That the agreement entered into between the parties hereto, known as the "Uniform Contract for Express Operations" effective on the first day of September, 1920, is hereby amended to read as follows:

So far as the provisions of this agreement are material to the present issue they are substantially the same as those of the "Uniform Contract for Express Operations" (Exhibit 15 hereof) and they are not repeated here.

263 "EXHIBIT No. 16."

Express Operations.

Agreement between ..... and Railway Express Agency, Incorporated.

Effective March 1, 1929.

This Agreement, made as of March 1, 1929, between ....., hereinafter called the "Rail Company", and the Railway Express Agency, Incorporated, a corporation of the State of Delaware, hereinafter referred to as the "Express Company",

Witnesseth:

Whereas, the Rail Company has united with other carriers operating railroads in the continental United States

to acquire through their own express agency the properties of the American Railway Express Company employed in the express business, and to conduct through such express agency the future operations of the express business; and

Whereas, the Express Company has been organized as the joint express agency or facility of the Rail Company and other carriers uniting as aforesaid, all of which have undertaken to enter into agreements with the Express Company identical herewith;

Now, Therefore, for and in consideration of the mutual covenants, separate services and payments hereinafter recited to be by the parties kept, performed and made, the parties do hereby agree as follows:

Article I.

Sec. 1. The express transportation business to be carried on under this agreement is understood to mean such express transportation business as was carried on by the American Railway Express Company under the contract known as the "Amended Uniform Contract for Express Operations" effective March 1, 1923; together with transportation of property, under the conditions provided in Section 3 of Article II hereof, by means of the instrumentalities named therein. The maximum weight to be carried in any of the cars carrying express business shall not exceed a limit which in the judgment of the Rail Company is necessary for safety. Articles which can only be loaded and unloaded through end doors of express or baggage cars, causing delays to passenger trains in switching for this purpose, shall not be accepted by the Express Company unless a special car is furnished and charged for as a carload shipment, and the Express Company shall not accept shipments which cannot be so handled as to avoid unusual delays to the trains of the Rail Company; Provided,

however, that nothing in this section contained shall be construed to prevent the Rail Company from performing any transportation service required by any present or future law.

Sec. 2. Said express transportation business shall be conducted under such rates, charges, classifications, divisions, rules, regulations, and practices and subject to such limitations and conditions as are now or may hereafter be lawfully established, provided: (a) that, where carload rates are made for express matter, the minimum weight shall not be less than at the time prescribed by the railway companies for freight, unless otherwise ordered by Federal or State Commissions or concurred in by the Rail Company; and (b) that rates per 100 pounds made for express matter shall not be less than twice the prevailing class freight rate, between the same points, and in no event less than twice the prevailing first class freight rate unless otherwise ordered by Federal or State Commissions or concurred in by the Rail Company.

Article II.

Sec. 1. The Rail Company hereby constitutes and appoints the Express Company its exclusive agent (a) for the conduct and transaction of the express transportation business, including the off line auxiliary service (commonly known and referred to as pick-up and delivery), upon such passenger, express or mail trains of the Rail Company as may be agreed to, over the main lines, branches and extensions of all railroads now or hereafter, during the continuance of this agreement, owned or leased, and operated by the Rail Company, and (b) for the collection and disbursement and/or division under this agreement of all revenues accruing under this agreement; but nevertheless subject to the conditions and limitations in this agreement contained. All classifications, tariffs and other rules or

regulations relating to the transportation of express matter required or permitted to be filed with the Interstate Commerce Commission or other public body may be filed by the Express Company on its own behalf and/or on behalf of the Rail Company and other carriers with which the Express Company may enter into agreements similar hereto, and to this end the Rail Company hereby constitutes the Express Company its true and lawful agent for the purpose of filing with the Interstate Commerce Commission and any other proper public body, domestic or foreign, all necessary classifications, tariffs and other rules or regulations relating to the transportation of express matter.

Sec. 2. The Rail Company further agrees that it will not for compensation knowingly transport valuables, money, goods or property of any description independently of the provisions of this agreement, or permit its officers, agents or employees to do so on any of its passenger, express or mail trains, except as follows:

(a) Where, under the terms of the "Amended Uniform Contract for Express Operations" effective March 1, 1923, the Rail Company was entitled to the exclusive or joint right to handle any particular commodity upon passenger, mail or express trains, the Rail Company hereby reserves such exclusive or joint right as to such commodity under this agreement.

(b) Where the Rail Company serves written notice upon the Express Company of its election to suspend the agency of the Express Company to transport property in carload shipments, as defined in Section 1 of Article V hereof, in which event and unless and until such election shall be revoked the Rail Company may move such carload shipments in its passenger, express or mail trains independently of the provisions of this agreement.

The Rail Company reserves the right to transport any property independently of this agreement by means of motor truck, aircraft or any other instrumentality than railroad train, and to perform in connection therewith the auxiliary service commonly known and referred to as pick up and delivery.

Sec. 3. The Express Company may engage by means of motor truck, aircraft or any other instrumentality than railroad train, in the transportation of property which would otherwise be transported on trains of the Rail Company, but only with the consent of the Rail Company and of all other carriers executing this form of agreement which would participate in such transportation if conducted by railroad; provided that any such consent may be withdrawn by not less than six months written notice; and provided further that as to any transportation by motor truck or aircraft conducted by the American Railway Express Company on February 28, 1929, the consent hereinbefore required shall be assumed unless and until such assumed consent shall be withdrawn or terminated by not less than six months written notice.

* * * * * * * * *

Article III.

Sec. 1. The Rail Company shall as soon as practicable furnish space in cars, adequate in number and suitable for use in passenger, mail, or express train service at passenger train speed; said cars to be properly heated and lighted, and lettered "Railway Express Agency, Inc."; and shall transport said cars on such passenger, mail, or express trains as may be agreed to, from time to time, as necessary to meet the reasonable requirements of the public for express service. The Rail Company shall carry in such cars the express matter, with the safes, packing

trunks, and train supplies and equipment of the Express Company, together with the messengers, helpers and guards of the Express Company, necessary for the handling of such express matter to destination or to the proper transfer points.

Sec. 2. Special express trains, if run by the Rail Company, shall be run without extra compensation to the Rail Company.

Sec. 3. In order that the Rail Company may not be required to run more cars than are necessary, the Express Company shall use the unoccupied space in the baggage and other passenger train cars of the Rail Company to the greatest extent practicable, and the Rail Company shall likewise have the right to use any unoccupied space in any car supplied by the Express Company.

Sec. 4. Whenever the Express Company to meet emergency shipments is obliged to rent live stock, refrigerator, or other cars to handle such shipments by reason of suitable cars not being available on the railroad on which the traffic originates, the Rail Company agrees that it will assume the entire rental payment for such cars when the shipment moves exclusively over its lines; and when the movement is partly over its lines and partly over the lines of one or more other railroads the Rail Company shall assume such part of the rental charge as the proportion of the express revenue on the shipment earned on the Rail Company's lines bears to the total express revenue on the shipment; provided, however, that where shipper is required to pay an additional charge for such rented equipment, the rail companies involved will be credited with such additional charge.

Article V.

In addition to other payments herein provided for the Express Company shall account to the Rail Company, as hereinafter in this Article provided.

Sec. 1. Upon carload shipments consigned from one consignor to one consignee at one destination, moving under rates which exclude vehicle service, the Express Company shall first pay to the Rail Company 85 per centum of the gross revenue accruing on its lines from the rail haul (not including in the gross revenue from the rail haul any charges separately ascertainable for refrigeration, partial loading or unloading in transit and other accessorial services), the remaining 15 per centum of such gross revenue from the rail haul, together with the charges for any separate vehicle service, refrigeration, partial loading or unloading in transit and other accessorial services, shall remain in the revenue of the group (item (a), Sec. 4, of this Article) in which such charges accrue.

* * * * * * * * *

Article VI.

The Express Company shall as soon as practicable furnish adequate and suitable equipment, and shall use its vehicles, property, offices, and other facilities, and its agents and employees in operating an express transportation business as agent of the Rail Company; and in the conduct of said business shall exert itself in all proper ways to make said business satisfactory to the public and to the Rail Company.

* * * * * * * * *

Article XVII.

The Express Company agrees that the icing and refrigeration of cars in the service of the Express Company while on the lines of the Rail Company shall be performed by the agency employed by the Rail Company for this purpose, for account of the Express Company, the Rail Company agreeing that the charges for such service shall be reasonable.

271 W. W. OWENS, testified for the defendant:

Direct Examination.

I am W. W. Owens and am vice-president of the Railway Express Agency with headquarters at Atlanta, Georgia. I have held that position since September 1st, 1931. I have been continuously in the express business since September 1892, having been employed by the Adams Express from that date until 1902; Great Northern Express Company, with headquarters in St. Paul, Minnesota, from 1902 to 1913; and the Southern Express Company from January 1914 to July 1st, 1918. Headquarters in Chattanooga, Tennessee. At the time of the consolidation of the Southern Express with the other companies I was Second Vice President of Southern Express, headquarters in Chattanooga. That was on July 1, 1918 and then I was employed by the American Railway Express from July 1, 1918, to January 31, 1929.

When with the American Railway Express Company I was General Manager of the then Southeastern Department, with headquarters in Jacksonville, Florida, from July 1st, '18 to January 1, 1921, and General Manager of

the South Atlantic Department from January 1st, 1921 to September 1st, 1931, or 1929 at the time the Railway Express Agency came into being, and I continued in the position of General Manager of the same department with the Railway Express Agency. In 1930 I was General Manager of the South Atlantic Department of American Railway Express Company with headquarters in Washington, D. C. From that position I went to the Vice Presidency of Railway Express Agency in Atlanta in 1931, September. As Vice President at Atlanta I have charge of and control of the express operation on the lines of the Seaboard Air Line Railroad throughout its entire system. So far as the express traffic is concerned, I had charge in 1930 of the lines of the Seaboard Air Line north of Jacksonville. When I was transferred to Washington in January 1921 I was made a member of the company's committee on wages and working conditions. In addition to my position as General Manager of the South Atlantic Department, I continued in that position until I was appointed the Vice President in Atlanta in 1931. Mr. L. R. Gwyn was chairman of that committee at the time I served on it I have examined the company's records and files in my office to determine when complaints were lodged, claims filed, or demands made with respect to the twenty-two persons whose claims for compensation on account of changed commissions or payments made to them are set out in paragraph eight of the complaint. The claim of F. C. Dinkins was first presented by Local Chairman of the Brotherhood of Railroad Telegraphers in, I think it was June 1930, if I recall the date correctly. I have letters that will disclose that information. The claim was first presented by Mr. O. L. Harrison, Local Chairman of the Order of Railroad Telegraphers to Mr. G. L. Hurley, Superintendent of the Seaboard Air Line Railroad, June 20, 1930. In the form of a letter making a request that Mr. Dinkins be paid commissions at the rate of seven per cent

on the gross charges of carload strawberry business, rather than at the rate of $5.00 per car, which he received. The claim presented aggregated $4,203.46 at that time. That was a letter addressed to Mr. Hurley, Superintendent of the Seaboard. We never heard from the telegraphers organization at that time about it. We did hear from Mr. Hurley. Mr. Hurley wrote our Superintendent, Mr. Scruggs, at Jacksonville, asking what the position of the company would be. Mr. Scruggs informed Mr. Hurley that he had negotiated an agreement with Mr. Dinkins. Mr. Scruggs considered the claim and denied it and Mr. Hurley was advised of the denial. I refer now to a letter dated July 15, 1930 addressed to Mr. Harrison from Mr. Hurley, which purports to be in reply to the letter I have just a moment ago identified. That is the letter in which Mr. Hurley gave Mr. Harrison the benefit of the decision reached by the Superintendent of the Express Agency. Those two letters, one from Harrison to Hurley, and the other from Hurley to Harrison, about which I have testified I identify as my exhibits D-1 and D-2. Between this time in 1930 and the receipt of a letter written February 25, 1935, I am aware of no claim being presented or any demands made in behalf of F. C. Dinkins either by himself or through any other person or organization to my company. I have not heard of such a claim. If the demand had been made to a subordinate official of my company it is most reasonable to assume it would have come to me before the decision of the subordinate official would be made, and I never heard of it until I got a letter from Mr. Thompson dated February 25, 1935. Exhibit D-3 to my testimony is the letter of 1935 from Mr. Thompson as General Chairman, in which he demands a conference with the Express Agency. The conference was never accorded him.

Now about Rutherford, Alabama. When the office at Rutherford, Alabama, was re-established on a straight commission basis the first notice we had of any controversy in connection with the rate of payment was a let-

ter from Mr. Thompson dated November 17, 1933, addressed to B. W. Hendricks, Superintendent of the Railway Express Agency at Jacksonville, Florida. Mr. Hendricks had supervision over the Rutherford, Alabama agent at that time. Mr. Hendricks answered Mr. Thompson November 20. The claim was denied. There was no understanding to pay $10.00 guaranteed commission. I identify those two letters as my Exhibits D-4 and D-5. Subsequent to that time my company had further complaints, demands, or claims on behalf of this agent at Rutherford, Alabama, on the subject that we are discussing. Mr. Thompson evidently took the matter up with the Seaboard Air Line Railway because I received a communication from General Manager Bagwell dated March 1, 1934. And Mr. Bagwell asked what the position of the agency would be in the payment of $10.00 minimum commission. In reply I advised Mr. Bagwell that we would not pay the $10.00 commission, that we had an agreement with the agent to handle the office on a straight commission basis. I don't know whether that information was given Mr. Thompson. I gave it to Mr. Bagwell and I heard nothing from it since that time. I so advised Mr. Bagwell on March 30, 1934. I have not a copy of that letter here which I identify as Exhibit 6. As to whether I have ever received any claim or whether my company received any claim, demand, or complaint from any of the other of the twenty-two agents asking for re-establishment of allowances, commissions or payments to them of commissions improperly denied—well, there were two instances that were not the result of claims by the agents but results of claims by the company because the agents had taken improper funds from the receipts of the office to compensate themselves, as the company contended. I refer to Southern Pines, N. C. and Emory, Georgia. The "Stipulation" correctly states the facts as to those two places. As a result of the deductions made by Agent Stutz at Southern Pines of commissions in excess of $5.00 per car, the com-

pany charged the excess commission to the Southern Pines Agency and on a great deal of investigation was made both by the agency, and you might say the representative of the organization. I happened to know. I have in my files the information. Mr. Thompson at one time talked to the Sea Board Air Line about the excess commission, alleged excess commission, at Southern Pines. That was in 1932. In 1932 an agreement was made. I don't know whether the conversation was then or not, but I do know an understanding was reached between the Seaboard Air Line Railway and the Railway Express Agency on behalf of Mr. Stutz, that the rate of $5.00 per car on carload shipments would be continued from the date of that agreement and the Railway Express Agency agreed to cancel the charges that we had previously made against the Southern Pines Agency for the excess alleged commission. You will find that recited in the "Stipulation." That was in 1932. Since that time I have had no complaint, nor has any demand been made in behalf of Stutz, either by himself or through any other person acting for him for commissions, either anti-dating that agreement or following it.

I spoke of another instance in which a claim was presented or demand made in behalf of one of these joint agents and I mentioned Emory, Georgia. That was another case where an agent deducted commissions in excess of the amount the company maintained he was entitled to. The company therefore charged that office with that. That appears in the stipulation. And we could not get this man to settle the charges. An agreement was reached between the Emory Agent, Smith, that he would reimburse the company and the office was re-instated as a joint agency on October 5, 1931. I have not since that time, either direct from Smith or from any other person acting for him, or any organization acting for him, had any complaint or demands from him.

There are no points other than the four I have mentioned among the sixteen points here involved as to which I have had any claim presented to the company for reimbursement of commissions improperly paid. I make an exception in the instance an agent (I have forgotten the name of the point now, but I can readily turn it up) wrote and asked that his previous payment be restored, and that was done. That is the only case and it is covered in the "Stipulation." Other than that and other than the four instances of which I have spoken, I have had no complaint, demands or claims, presented for commissions alleged to have been improperly deducted or allowed to the agents.

On August 1, 1917 there were aproximately 375 joint agents on the lines of the Seaboard Air Line Railway. That was in the days of the Southern Express Company. There were approximately that same number on July 1st, 1918 and approximately three hundred and fifty in 1930.

One of the exhibits, being Exhibit E to the "Stipulation," is a letter dated March 25, 1930, written by Scruggs to one Richards, Agent at Edison, Georgia, and one letter written by May, Superintendent, under date of April 8 to Joiner at Branchville, Virginia. The "Stipulation" provides that letters of that kind were sent to all of the agents. There were three hundred forty-four joint agents furnished on the Seaboard Air Line—furnished that advice. We received replies from two hundred fifteen accepting the notices. We received replies from twenty-nine questioning the correctness of the notices, or objecting in one way or another, to them. There were even one hundred agents did not acknowledge receipt of the letter, but no agent has failed to comply with the instructions in the letter.

I was in the City of Washington in the capacity of an official of any express company during the days of 1918 when the Southern Express Company and the other express companies ceased to operate as express companies. The "Stipulation" provides that was on July 1st, 1918

that the American Railway Express Company came into existence. I know the circumstances under which commissions were paid to the joint agents by the American Railway Express Company after it began operation, what commissions were paid, and how they were determined and arrived at. Under the contract with the Director General of Railroads the American Railway Express Company took over a going business and took over the people in it, and they paid the people the rate of compensation, either straight salary or commission, that they received with the company from which they came. As an official of the Southern Express Company and as an official of the American Railway Express Company, I know that the contract of August 1st, 1917, between the joint agents and the Southern Express Company was never transferred or assigned to the American Railway Express Company. I know that to be a fact.

Cross Examination.

I mean there was no assignment of the contract to American Railway Express Company.

In connection with the settlement of the claim of Stutz at Southern Pines, the officials of the Express Agency did not negotiate with the General Chairman of the Order of Railroad Telegraphers in connection with that claim. They negotiated with the Seaboard Air Line Railway and with Mr. Stutz. As to whether Mr. Thompson ever entered the picture—well, my files show that he complained to Mr. Bagwell, then General Manager of the Seaboard Air Line Railroad, and Mr. Bagwell got our officials to go with Mr. Stutz and made the adjustment that was agreed upon. I don't know whether or not Mr. Thompson was ever asked to approve that agreement that was made with Mr. Stutz, as General Chairman of the Order of Railroad Telegraphers. As to whether or not any of these claims that are involved in paragraph eight of the petition were ever

taken up by the O. R. T. with Mr. Smith, who was my predecessor here as Vice-President.—I cannot say. Certainly the files in my office indicate there were no conferences concerning any of these claims. As a matter of fact, my predecessor declined consistently to talk to the Telegraphers organization about any claim and referred it to Mr. L. R. Gwynn, the chairman of the committee of the company on wages and working conditions.

Re-Direct Examination.

My predecessor Mr. Smith is deceased. He left the express service August 31, 1931.

Defendant introduced in evidence, and they were received without objection, the six exhibits identified by the witness W. W. Owens, as follows:

280 "EXHIBIT No. 1."

Order of Railroad Telegraphers

S. A. L. System Division 28.

Shortage Express commission Lawtey Agency. Car Load.

Hampton, Fla., June 20, 1930.

Mr. G. L. Hurley, Supt.,
Jacksonville, Fla.

Am herewith submitting statement Express business car loads shipment from Lawtey, Fla. from Feb. 28th to May 22, Inc., 1930.

Settlement of commission Five dollars per car load was made with Mr. Dinkins Agent at Lawtey, on this business

of which only resulted in a total commission $660.00. Express Company inaugurated a rule of Five dollars per car on this business instead respecting our agreement of usual commission .07%, which results in Agent's commission amount $4863.46. Difference as stated by statement attached of $4203.46.

Rule 30 of our Agreement, and which was promulgated by the Railroad Labor Board in Decision No. 757 & 1634 provides that as long as employes are required to handle Express business, the Express Commission allowed them for that work shall not be discontinued except by mutual agreement between the Representatives of the employes and the carrier.

Under above facts, we concur no agreement has been reached to effect employes commission as placed by Express Company of Five dollars per car load, and therefore claim amount $4203.46 as express commission at regular rate 07.% difference due Agent Mr. C. Dinkins at Lawtey, Fla.

I respectfully file claim with you for immediate handling effecting settlement of above amount, and advise when you have thus done myself with Mr. Dinkins.

Yours truly,

O. L. HARRISON,

Local Chairman, O. R. T.

281 "EXHIBIT No. 2."

Seaboard Air Line Railway Company

Shortage of express commissions—Lawtey Agency.

Jacksonville, Fla., July 15th, 1930.

File A-517.

Mr. O. L. Harrison,
Local Chairman, ORT.,
Hampton, Fla.

Dear Sir:

Referring to your letter June 20th, making claim amounting to $4203.46 as express commission for Agent C. Dinkins, Lawtey, and my reply of June 20th, in which I advised you this matter had been referred to the Express Co. for handling.

I am just advised by this Co., that this claim is declined inasmuch as the Railway Express Agency knows nothing about rule 30 or decision No. 757 and 1634 and were not in existence during the regular labor board administration.

Therefore, I am closing my file on this claim.

Yours truly,
G. L. HURLEY,
Superintendent.

282 "EXHIBIT No. 3."

S. A. L. System Division 28.

Order of Railroad Telegraphers

Rochelle, Ga., February 25th, 1935.

Mr. W. W. Owens, Vice-President,
Railway Express Agency, Inc.,
89 Luckie St., N. W.,
Atlanta, Ga.

Dear Sir:

As you doubtless know, April 1930 your superintendents issued a circular to joint Seaboard Air Line Railway and Railway Express Agency agents advising these joint agents that the Railway Express Agency would no longer pay the regular commission on car load traffic, instead $5.00 per car would be paid.

We immediately protested this action as a violation of our contract and pointed out if any change was to be made in rates of pay, working conditions & etc., such must come about as a result of Article 14 of the agreement being complied with. However, the superintendents would not withdraw instructions contained in their circulars above referred to.

As a consequence claims for the difference in regular commission as provided in our agreement and the $5.00 per car allowance as provided for in the superintendents circulars were entered. There were several of such claims, but one in particular I have in mind is that of Agent C. C. Dinkins, Lawtey, Fla., whose claim amounted to $4,203.46 which represents such difference obtaining in March, April and May 1930.

Mr. Dinkins' claim was handled with Mr. Scruggs, your Superintendent at Jacksonville, by and through Mr. Hur-

ley, Seaboard Superintendent, but claim was declined. The Seaboard Air Line being the primary employer and following out rulings that had been handed down by the old Railroad Adjustment Board we handled the matter with the General Manager of the Seaboard Air Line in an effort to have him intervene with a view of adjusting the claims and have our agreement respected and complied with thereafter. This matter was the subject of negotiation and discussion between Mr. Bagwell, General Manager, Seaboard Air Line, and our organization from time to time. I don't think I need give you the history of these negotiations for doubtless you have the files, or at least you can get them, so I think it sufficient here to state claim is yet unpaid.

We hold Dinkins' claim is nothing more than what he is entitled to under the terms of our contract, but since your Superintendent has declined to do anything about the matter and we have been unsuccessful in having the Seaboard Management intervene, we desire, in accordance with Article 5 of the agreement, to have a conference with you on the subject in an effort to bring this matter to a final conclusion. Therefor, I am requesting that you name a date for such conference, giving me as much as four or five days advance notice.

Please advise.

Yours very truly,

R. F. THOMPSON,

General Chairman.

283 "EXHIBIT No. 4."

Order of Railroad Telegraphers

S. A. L. System Division 28.

Rochelle, Ga., Nov. 17, 1933.

Mr. B. W. Hendricks, Superintendent,
Railway Express Agency,
Jacksonville, Fla.

Dear Sir:

It has come to my attention the Rutherford, Ala., agency has been taken off a minimum monthly compensation of $10.00 per month and placed upon a strictly commission basis.

Our agreement with the Express Company provides a minimum monthly guarantee of $10.00 per month, and no agent has the authority to make any individual agreement contrary thereto. We, therefore, ask that you restore the minimum guarantee at Rutherford and compensate the agent for any different amount so paid during the time present arrangement has been in effect.

Please advise.

Yours very truly,
B. F. THOMPSON,
General Chairman.

284 "EXHIBIT No. 5."

November 20, 1933.

Mr. R. F. Thompson,
General Chairman,
Order of R. R. Telegraphers,
Rochelle, Georgia.

Dear Sir:

Express Agency—Rutherford, Ala.

This is written in response to your letter of November 17th.

Because it could not be maintained without an actual loss to the company on payment of a guaranteed commission of $10.00, this company, with authority of the Alabama Public Service Commission, discontinued the Rutherford, Ala., agency under date of June 30, 1933, and reestablished the same on October 6, 1933, at the specific request of the agent at Rutherford, who requested that the agency be reopened and that he would be glad to handle the business for the actual commission earned.

We can not consider payment of a guaranteed commission of $10.00 per month at Rutherford.

Yours truly,
B. W. HENDRICKS,
Superintendent.

285 "EXHIBIT No. 6."

76-5

March 30th, 1934.

R:W.

Mr. E. C. Bagwell,
General Manager,
Seaboard Air Line Railway,
Norfolk, Va.

Dear Mr. Bagwell:

Again referring to your letter of March 1st in regard to our establishing a joint express agency at Rutherford, Ala., without allowing the Agent a guaranteed minimum of $10.00 per month:

In this instance, our Superintendent overlooked handling with your Superintendent the matter of compensating Agent Walker on straight 10% commission basis without the usual minimum, but I enclose a copy of Mr. Walker's letter of August 23rd, 1933, to Route Agent Marshall, in which you will note he agreed to the basis of pay that was established.

We did, however, consult your people about a number of similar situations, and they were agreed to.

Under the circumstances, it does not seem to me that the Agent should have made a complaint about the matter as we would not have reopened the office, which was originally closed on June 28th, 1933, if there had not been some concession in the matter of compensation.

Yours truly,

.....

Vice-President.

(Defendant rests.)

286 R. F. THOMPSON, testified for the plaintiff:

Direct Examination.

My name is R. F. Thompson. I live at Rochelle, Georgia. I am General Chairman for the Order of Railroad Telegraphers on the Seaboard Air Line Railroad. The Order of Railroad Telegraphrs is an organization of agents, operators and employees of the Seaboard that is covered by our craft, or our scope you might say, and it also functions in the interests of any working conditions and wages with regard to their employment. It is an organization of national scope. The general headquarters of the organization is at St. Louis, Missouri. I am General Chairman of the Division Number 28, the Seaboard Air Line Railroad. That is just one of the divisions of the ORT. I am General Chairman of the Committee. The Committee is composed of a Local Chairman on each division of the railroad, and they are elected by a vote of the men, and in turn the Local Chairman elect a General Chairman. We have seven Local Chairmen at this time, and those Local Chairmen elect a General Chairman from their number. I am the General Chairman of that Committee. And the Local Chairmen are elected by the members of the Order of Railroad Telegraphers who are employed on the Seaboard Air Line Railroad. On each division there is a candidate for Local Chairman when election time comes and whoever gets the most votes is elected Local Chairman. That is how that happens. The system is divided into seven divisions and those Local Chairmen have jurisdiction of each district. I have handled the claim, as General Chairman, of the Order of Railroad Telegraphers, of the Joint Agents against the Railroad Express Agency before the National Railroad Adjustment Board. Prior to the time that that appeal was made to the National Railroad Adjustment Board in 1935 I had taken up with the officials of the Railway Express Agency, Inc., the

claims of my organization that the contract of August 1st, 1917, had been breached by a reduction in the rates of pay provided in that schedule to that contract. I have tried to handle those claims, but I could not handle them because I was in some ways blocked in handling them. As to what I did relative to handling of the Dinkins claim at Lawtey, Florida, for instance—well, the papers came to me from the Local Chairman, Mr. Harrison, down on the Florida Division, and he indicated that he had handled the claim through the Superintendent of the Seaboard and he in turn had handled it with the Superintendent of the Express Company, and he had taken, the Express Company Superintendent had taken the position that we had no agreement with the company, and therefore the claim was declined, which was in line with several other decisions, or I will say positions, that had previously been assumed by other superintendents and officials of the company. I cannot recall whether prior to the time of taking up the Dinkins claim with them I had also discussed the claims of other agents under the provisions of that contract. But I know there were several, just what claims they were, but I know there was more than one claim that arose under that condition that they sent out the circular arbitrarily placing a rate of $5.00 per car on reducing the minimum at certain points, and things of that kind. I presented the claim to the company contending that the contract of August 1st, 1917, was in force and that they had no right to reduce the rates of pay or commissions below that contract schedule, and their reply to me was that they had no contract with the Order of Railroad Telegraphers providing the schedule that I contended for. After these claims I got several claims from different points over the line, different parts of the division, and they were in my hands and I could not get any satisfaction out of the superintendent. I asked Mr. Smith, who was then Vice-President in Atlanta, or General Manager one, I am not certain about what title it was, but I did ask Mr. Smith

for a conference. As General Chairman, I advised of the correspondence between my Local Chairman, O. L. Harrison, at Hampton, Florida, and Mr. G. L. Hurley, the Superintendent of the Seaboard Air Line at Jacksonville, Florida. The file was referred to me. I knew of the position which the Express Company had taken with regard to the claim of Dinkins in June and July of 1930. I wrote this letter of February 25, 1935, to Mr. Owens, the Vice President of the Railway Express Company. (Exhibit 3, Witness Owens). That was relative to the Dinkins claim at Lawtey, Florida. I wrote to Mr. L. R. Gwyn of the Express Company about the claims that were pending and asked him for his position on it and what he would do about it. I recall that. He took the same position, that we had no agreement and it was not in effect. No agreement was in effect.

By Mr. Foster:

That is a letter. May it please the Court, I would like very much to have the letter produced and the date fixed. I think we are entitled to have the letter. He is making some very broad statements now. That might very well be construed to be a pending claim. We know of no such letter that was written.

By Mr. McRae:

He is not testifying to what the letter contained except to state the position of Mr. Gwynn was like the position of all other officials of the Express Company with regard to whether or not there was an agreement existing.

By the Court:

If he got that by letter of course the letter would be the best evidence.

By Mr. Foster:

I want to know what was the subject of the negotiations and when it took place.

By the Court:

It would be material, as the Court sees it. So far you would have to have some reference to the date to enlighten the Court.

By Mr. McRae:

Q. Can you tell when those exchanges of correspondence took place, Mr. Thompson?

A. I can't fix the exact date, no.

Q. Prior to the time that you presented the matter to the Railroad Adjustment Board, had you communicated with Mr. Gwynn relative to joining with you in presenting this dispute to the National Railroad Adjustment Board?

A. Yes, I requested him to join with us in presenting the case to the National Railroad Adjustment Board.

By Mr. Foster:

Can you identify it again by date?

By Mr. McRae:

That is in the record of the proceedings before the National Railroad Adjustment Board in the exhibits, the exact date.

By Mr. Foster:

All right.

The Witness:

We have never had any Board of Adjustment on the Seaboard Air Line. We have never had any Board of Adjustment established to adjust disputes between the joint employees of the railroad and express company, the

express company on the Seaboard Air Line Railway. But in 1934, I think the National Railroad Adjustment Board was created by law. I think that was the year. I am not sure about that. 1934 I think. That was when the Railway Labor Act was amended I think. We have never had a system board of adjustment on the Seaboard Air Line Railway.

Cross Examination.

When we had a dispute, or a claim, we will say, it was first handled by the superintendent and local chairman, and if they were not able to reach an agreement or settlement of it it was referred to the general chairman, and the general chairman took it up with the general manager of the Railroad and they were disposed of there through that process. If we suppose that the general chairman and the general manager could not agree, then the only thing we had then, we could ask for mediation. But we never had a system board, nor did we have an adjustment board agreement under the 1926 act. I am now talking about the railroad employees on the Seaboard, the agents, and with respect to railroad matters. I made a statement to the effect that prior to filing the appeal with the National Adjustment Board, from which this award has come, I undertook to negotiate the matters set up in that appeal with the Railway Express Agency through contact with Mr. Gwynn. You read from page 5 of my appeal as shown by Exhibit 3 to the "stipulation" as follows: "In attempting to treat with the Railway Express Agency on these matters of violation of the express contract, the Express Company assumes the attitude that our organization has no agreement with the Express Company and declines to recognize our committee as the representative designated by the Joint Agents to handle such matters and has declined to join with us in submitting the dispute to the National Railroad Adjustment Board". That is what I had

reference to. As to when that declination to join with me in submitting the disputes to the National Adjustment Board was made—well, after I had handled with the General Manager of the Seaboard in an effort to get him to intervene for the adjudication of these claims and nothing came out of that, then when the Board was established—I am talking about the Railroad Adjustment Board—that is the 1934 Act. To lay the foundation for appealing this case to the Board, which we had never been able to get settled on the property, I wrote Mr. Owens, and in turn to Mr. Gwynn, and the object of that was to lay the foundation for getting to the Board. Now that is that.

By Mr. Foster:

Q. Let's get that right. So the letter you refer to Mr. Owens is the letter of 1935?

A. Yes.

Q. That you have referred to here, and your letter to Mr. Gwynn was about that same time?

A. A little later, after I got Mr. Owens' letter.

Q. Now, Mr. Thompson, then it was when you say the Railway Express Agency declined to join with you in submission of the matter to the National Railroad Adjustment Board? That declination took place in 1935 in just about the way you have spoken of here, is that right?

A. I could not place the exact date, but I know it was somewhere along about that time.

Q. It was after the National Adjustment Board had been established?

A. Yes, it was after that.

Q. Under the 1934 Act?

A. Yes, sir.

(Both sides closed.)

The Court announced that the case would be taken under advisement and briefs were called for in lieu of oral

argument. Thereafter briefs and reply briefs were submitted for both parties. The decision remained in the breast of the Court until the 26th day of June, 1942 at which time the District Judge made findings of fact and conclusions of law in favor of the plaintiffs and these with the opinion and decision of the Court were filed on that date.

On August 3, 1942, pursuant to notice and hearing the Court made additional findings of fact and rendered judgment in favor of the plaintiff and against the defendant. This judgment was entered on the 3rd day of August, 1942.

The foregoing evidence is correct.

BLAIR FOSTER,
Attorney for Appellant.
WM. G. McRAE,
Attorney for Appellee.

Filed Oct. 9, 1942.

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294 OPINION.

(Title Omitted.)

This is a suit instituted by the Order of Railroad Telegraphers against the Railway Express Agency, Incorporated, seeking to have this Court enforce an award of the Third Division of the National Railroad Adjustment Board. In the proceeding eventuating in the award and in this suit the Order of Railroad Telegraphers appear as the representative of joint railroad express agents employed on the lines of the Seaboard Air Line Railroad. The term "joint railroad express agents" refers to and describes

those individuals who are railroad agents and likewise express agents at designated points on the named railway. The respective parties and the board as concerned in this proceeding will be referred to as the O. R. T., the agency, the board, and the joint agents.

The record of the proceeding before the board is exceedingly voluminous and embraces a wide range of what is denominated by the parties numerous and various "briefs", "pleadings", "oral presentation", "memorandum", "surrebuttal", "reply", relating to the question of jurisdiction of the board, and thereafter a response, oral argument, answer to oral argument and "reply to the answer." It is stipulated here that proceedings before the board are informal to the extent that testimony in the sense of evidence given under oath is not usually received; that the board generally acts upon unsworn statements contained in the documents above referred to. That such statements become part of the record before the board and are considered by it in making its judgments and decisions. It is further stipulated that this rule of the board was applied in the present instance. It should be stated that some of the documents contained afidavits of various parties or its officers. All together there are sixteen exhibits in the present record, one exhibit having fourteen sub-exhibits, two others having one each. The parties have, for the convenience of the Court, entered into a stipulation of facts identifying and explaining the exhibits, and have also stipulated the correctness of the exhibits as well as the truth of certain facts set forth in the exhibits.

The dispute revolves around the force and effect to be given an agreement concerning rates of pay and working conditions entered into on August 1, 1917 between the Southern Express Company and a representative of the joint-agents, and in connection therewith the validity of individual agreements and modifications of the 1917 agree-

ment by the agency at sixteen of its offices, affecting through the years twenty-two joint-agents. It should be stated that the agency contends that it has never assumed and is not bound by the 1917 agreement.

The agreement of 1917, above referred to, contains fourteen brief articles, and, as relates to the present controversy, is designated "Southern Express Company-rates of pay and regulations for joint-express and railroad agents on the Seaboard Air Line Railway." Article 1 applies the "schedule" solely to express agents as above designated. Article 2 prescribes payment to be made as commissions on total business received and forwarded, based on previous year's business, and sets forth specified commissions. It is provided that when commissions do not exceed $10.00 per month a guarantee of $10.00 per month will be paid. Article 3 provides that at points where agents are required to transfer express matter to or from other lines or trains, they will be paid a minimum of $10.00 per month for such service. Article 9 provides that agents will be allowed to deduct their commissions at the close of each report. Article 12 provides "these rules are not to be construed so as to reduce compensation at points where the rates of pay are in excess of the above rates." Article 14 provides "no change will be made in the foregoing articles until after notice of thirty (30) days in writing has been given."

On July 1, 1918 the express business of the Southern Express Company on the Seaboard Air Line Railway was taken over by the American Railway Express Company, the express business of which on such railway was taken over on March 1, 1929 by the Railway Express Agency, Inc., the defendant herein. The agency by means of individual agreements with agents at specified locations made what is contended are unlawful changes in the 1917 agreement by reason of reduction in transfer rates; aband-

onment of minimum monthly guarantee; and establishment of a flat rate of $5.00 per car on carload shipments.

In October 1935 the President of the O. R. T., in behalf of the General Chairman of the O. R. T. on the Seaboard Air Line Railway instituted the proceeding before the board predicated upon the following claim:

"1. The commission rate on carload express shipments accruing to the joint railway-express agent at Lawtey, Fla., as established by Article 2 of the Express Agreement of August 1, 1917, and at all other joint agencies on the Seaboard Air Line handling carload express shipments, shall be restored as of the date the rates are arbitrarily reduced.

"2. That the minimum amount of commission of Ten Dollars ($10.00) per month, as established and guaranteed by Article 2 of the Express Agreement of August 1, 1917, shall be restored to the joint railway-express agency at Rutherford, Ala., and at all other joint railway-express agencies where the minimum rate has been arbitrarily reduced or reduced through individual agreement between the express company and agent; and that these agents be retroactively reimbursed in the amount of the difference that should have been paid under the Express Agreement.

"3. That all transfer allowances established by Article 3 of the Express Agreement of August 1, 1917, and higher rates in effect which have been arbitrarily changed, or changed by individual agreement, as at Moncure, N. C., shall be restored retroactively to the date such changes were made in violation of the Express Agreement, and all agents affected be paid the difference due them under said Express Agreement."

The respondent agency denied the jurisdiction of the board, contending that under the Railroad Adjustment Act the relation of employer and employee did not exist between it and the joint-agents, and that even if such relationship did exist respondent had no contract with such employees and that therefore there could be no violation thereof within the provision of the Railway Labor Act. This contention was denied, the board holding that it had jurisdiction of the dispute and ordered that the case be heard on its merits. Thereafter further responses of fact and argument were presented, the third division board was divided, a referee was named and the board made its findings and award.

In the present petition the O. R. T. sets forth the award and asserts that thereunder the agency should be required to pay to it as a representative of the persons for whose benefit such order was made the sum of $46,314.86. Specification is made of the amount due individual agents by name of agent and name of station. The petitioner prays for attorneys' fees and that the Court enter such judgment by writ of mandamus or otherwise as may be appropriate to enforce the order of the board requiring the agency to make effective the award. The defendant agency reasserted affirmative defenses which by amendment have been reduced so that those now presently insisted upon are in effect: (1) That the board was without jurisdiction for the reason that there was on June 17, 1934 no dispute or case pending within the terms of the statute. (2) That the agency did not assume, become subject to, and is not bound by the agreement of August 1, 1917, and that therefore the order of the board which in effect required it to pay a sum equaling the difference between the commission specified by the contract and those actually paid under the individual agreements is arbitrary and unreasonable. (3) That it does not owe the total amount or sums alleged to be due the individuals. (4) That for reasons

stated the individual contract for maximum commission on shipments of refrigerated carloads of strawberries from Lawtey, Florida was a valid contract. (5) That the award and order of the board are arbitrary and of no effect and validity for the reason that no sufficient findings of the fact are made by the board to support its award, nor do the findings of fact made by the board support the award; and that there was no substantial evidence before the board to support or authorize the finding, award or order of the board to the effect that (a) defendant was bound by the contract of August 1, 1917; (b) that the contract was breached when defendant made separate and different compensation arrangements with certain joint railway-express agents, and (c) that there was any pending dispute which gave the board jurisdiction to make the award or issue an order thereon.

Upon a trial of the case before this Court, in addition to the stipulation of facts above referred to, and in accordance with the reservation therein contained, evidence was introduced upon the issue of whether there was a case pending and unadjusted as of the date of the enactment of the Railway Labor Act. From this it appears that from the sixteen stations and twenty-two joint-agents employed thereat during the time covered by the present controversy there were four instances of claims presented seeking to recover the difference in the compensation paid and that contended to be provided for by the agreement of August 1, 1917. In each of these cases, the last communication being dated March 30, 1934, and the others dated prior thereto, the agency denied the claim and no further steps were taken by any party before June 21, 1934. However, the present claim was presented to the proper official of the agency before the matter was submitted to the Board.

Defendant contends that the record in this case shows absence of jurisdiction because, as urged, there was no case pending and unadjusted on June 21, 1934. Defendant's position is that while the dispute which was heard by the Adjustment Board may have arisen subsequent to the effective date of the Railroad Labor Act, the award of the Board, and the plaintiff's present suit seeks to deal with matters and enforce rights, arising prior to June 1934, but as to which there was at that time no dispute pending.

Careful examination of the voluminous record built up in the proceeding before the Railroad Adjustment Board, and the lengthy stipulation of facts, consideration of the voluminous briefs submitted by counsel, as well as independent investigation, has consumed much time.

Defendant contends that the Board was without jurisdiction to consider the dispute presented to it, or to make the award which it did because there was "no case pending on June 21, 1934" for the reason that any claims which had been presented had been either definitely rejected by the Agency, or else settlement had been reached with the claiming employee. Certain it is that the Agency had refused to discuss the claims of individual employees growing out of the reduction in commission on carload shipments, only four of which appear with any definiteness to have been presented, and two of which had been settled with the Agents involved. However, it does appear from the record as a whole that while the claim was not pushed, it was not settled, and unless the declination to settle could remove the "pendency" of the claim, a claim, even if not a "case" was pending and unadjusted on June 21, 1934. Furthermore, regardless of the merits, a claim or a dispute was presented subsequent to the passage of the Railroad Labor Act as amended (45 U. S. C. A., 151 et seq.). This was a claim for restoration of commission rates, though growing out of an earlier alleged illegal

reduction. In the hearing before the Board where the question of its jurisdiction was expressly raised, the Agency relied only upon two points, first that no employer-employee relationship existed between the parties, and second, that it was not bound by the agreement of August 1, 1917. The claim of the O. R. T. was that the agreement had been arbitrarily breached by the Agency, and that the employees were entitled to recover retroactively to the date of the reduction the difference between commissions actually paid and those due under the agreement, and further that the original rate should be *restored*. Thus, it embodied at least from the standpoint of the claim of the O. R. T. a dispute which in part arose after the effective date of the Railroad Labor Act as amended, 1934. Therefore, the Board had jurisdiction to hear. The question of the authority of the Board to render its award upon the claim was expressly involved and this question of jurisdiction, being primary, should first have been presented to the Board and it should be in clear cases only that Courts called upon to enforce the award should vitiate the same upon grounds not urged or presented to the Adjustment Board. Of course, clear absence of jurisdiction would render the award unenforcible, but failure to object before the Board upon all available grounds renders a subsequent attack subject to the closest scrutiny and requires to sustain it clear and unmistakable showing of absence of jurisdiction. Such is not made to appear in this case.

Thus, assuming the power and authority of the Board to hear and determine the dispute presented by the claim of the O. R. T., consideration will be next given the case on the merits. The facts in the case, while extremely lengthy, are not in substantial conflict.

The Adjustment Board found against the contention of the defendant, most strenuously urged, that the contract of August 1, 1917, between the Southern Express Co. and the joint-agents, had never been assigned to it, nor ac-

cepted by it, nor was it bound by its terms. The Board found that "from the making of that agreement in 1917 until in 1930 when the carrier reduced the commission rates and transfer allowances without conference and negotiation with the General Committee representing the joint-agents, the agreement continued in force and was observed by both the General Committee representing the agents or agencies and the respective successors of the Southern Express Company, and the facts are evidenced that the rates, rules, and requirements of that agreement did not expire with the change of ownership, management, or operation of the carrier, but has continued to exist as a contractual agreement between the two parties until changed in the manner provided in the agreement."

After consideration of the facts and conduct of the parties as submitted to the Adjustment Board, and giving effect to the provisions of the statute that the findings of the Board "shall be prima facie evidence of the facts therein stated," it is concluded that the defendant has failed to overcome the finding of the Board and will be held to be obligated by the agreement of August 1, 1917.

Defendant contends that the award is too indefinite for enforcement because no specific amount is found to be due any employee, it being only general as to classes without individual specification. It relies on the ruling in System Federation No. 59, etc., v. L. & A. R. Co., 119 F. 2d. 509. However, in the present case the issue was presented to the Board on the broad grounds of the applicability of the agreement and the right of the employees to have their pay restored retroactively to the date of the reduction. The award deals with the classes of illegal reductions claimed and orders the carrier to pay the amount due employees in the specified classes from the date of the reduction. As the figures and computations may all be secured from the books of the carrier this is

sufficiently definite and in fact has been made specific by the stipulation in the present suit as to the exact amount each joint-agent in question is entitled to recover if found so entitled under the applicable law and facts. Under these circumstances, and the parties having agreed thereon there would appear to be no necessity whatever for either dismissing the suit without prejudice, or staying the same until on a re-reference to the board, definite findings of fact and a definite award is made, in accordance with the procedure set out in System Federation No. 59 v. L. & A. R. Co., supra.

The present suit seeks to articulate the conditions and claims arising at the sixteen different stations in question to the general award. The facts surrounding each station and the controlling conduct of the parties, the facts and circumstances surrounding each individual agreement or situation, have been stipulated under sixteen paragraphs, and the definite amount due each joint-agent, if the Court determines him entitled to recover "under the facts and applicable law," is likewise stipulated.

The controlling question concerns the rights of the agency and the joint-agents to enter into individual agreements covering compensation at the sixteen stations at which were employed the twenty-two persons for whom recovery is sought in this suit. Finding the agreement of 1917, to be binding between the parties, and that the individual agreements were contrary to its terms, and that the General Committee representing the joint-agents was not consulted about, and did not negotiate such individual agreements, the Board concluded that the latter were "invalid and a violation of the principles of that agreement unless negotiated and ratified between the principals of the original agreement". The Board found "that in the conditions of the instant case an agreement exists and did exist in which the joint-agents making individual agree-

ments with the carrier, had previously made an agreement with the representative of the O. R. T., and so long as they were parties to that agreement they were bound by it, and so long as that agreement was in force any agreement subsequently made which was at variance with that original agreement was void unless the original agreement had been removed or voided by the same process as when it was made.

"In oth words in the claim at issue the facts are evidenced tha the joint Railway-Express Agents on the lines of the Seaboard Air Line Railway were working under a collective agreement which had been properly negotiated between and ratified by the carrier, or the Express Company, and its successors, and the organization of which they formed a part. So long as these joint Railway-Express Agents were employed by the carrier in such capacity, they were working under the rules of that agreement and were bound by its specifications and requirements; and any other supplementary individual agreement or contract made or entered into that would in any manner change or modify, invalidate or set aside, or that was at variance with the terms, rules and requirements of that agreement, was invalid and a violation of the principles of that agreement unless negotiated and ratified between the principals of the original agreement."

The Board further found that as no notice of change had been given as required by Article 14 of the Agreement of August 1917, the contract remained in force.

Proper determination of this important question has presented great difficulty. In one view the conclusion of the Adjustment Board would appear to be one of law only, as to which this Court should exercise independent judgment uninfluenced by the presumption of correctness afforded facts found by the Board. However, full considera-

tion of the question impels the conclusion that in the nature of the case, the type of the dispute, the public interest in the contractual relationship between interstate carrier employer and employee (evidenced and controlled by legislation), the ultimate conclusion of the Board upon a question involving mixed questions of fact and law is entitled, in a suit to enforce the award, to the presumption of prima facie correctness afforded by the statute. *45 U. S. C. A. 153 (p).* As argued by the plaintiff, the language of the statute is substantially the same as that of the Interstate Commerce Commission Act. *Meeker v. Lehigh Valley Ry. Co.*, 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644. There is little difference between the legal determination by the Interstate Commerce Commission of the question of infliction of damages by application of the law to the facts, *49 U. S. C. A. 16 (1) (2)*, and the determination of the question now under review. Similar considerations require like application of the awards of the Railroad Adjustment Board. This Board is likewise "appointed by law and informed by experience". *Ill. Central Ry. Co. v. I. C. C.*, 206 U. S. 441, 454, 51 L. Ed. 1128, 1134. It deals with and determines disputes arising from a relationship which has its own peculiar problems and customs, the existence of which developed "unwritten laws" and procedure even prior to effective statutory regulations. This development and its historical background is well portrayed by the decisions in the Railway Clerks case, in the District Court, 24 F. (2d) 426; 25 F. (2d) 873; in the Circuit Court of Appeals, 33 F. (2d) 13; and the Supreme Court, 281 U. S. 548, 50 Sup. Ct. Rep. 427. The presumption of validity afforded the findings of the Adjustment Board by the statute is only recognition of accepted fact that in such disputes a Board composed of men with knowledge of the entire relationship and peculiar circumstances surrounding the interstate-rail-carrier employer and its employees is, in the first instance, the proper agence to settle disputes and adjust differences in the man-

ner which will promote the avowed statutory purpose to prevent interruptions to interstate commerce.

The conclusion is required that the burden of showing the invalidity of the award (which admittedly rests upon the defendants as to findings of fact) extends also to the effect of the award where dependent upon mixed questions of law and fact. Here the defendant has not carried this burden, and fails to maintain its defense upon the ground that the award is without facts to support it and contrary to law because of the individual agreements it relied upon.

Though further lengthening an already too long opinion, some further observations may be appropriate. Even without regard to the presumptive correctness of the award of the Board, the conclusion reached by it appears correct.

The manifest purpose of the Railroad Labor Act is the protection of the right of employees to collective bargaining through representatives of their own choice. The statutes evidence a clear expression of Congress (the exclusive policy—making body in such matters) that industrial peace and uninterrupted commerce can be better maintained if employment relations between rail carrier and employee are conducted by bona fide representatives of a majority of the class or craft. Even before the mandatory provision of the amendment of the Railroad Labor Act of 1934, *45 U. S. C. A. 152 (4th)*, the propriety of majority rule in such matters had become well recognized by those most vitally concerned. The provisions of Sec. 152 (4th), supra, merely expressed the concept, already well established as a practical matter, that the true representative of the majority could more effectively promote the best interests of all in arranging terms and conditions of employment. No question of individual right of con-

tract in the first instance is here involved. If it were, a different conclusion might well be required. The question involves the validity of individual agreements made, without retraction of their representative, by persons subject to the collective agreement.

In view of the manifest purpose of the statute now under consideration it would seem that in such circumstances any sanction of individual agreements contrary to the terms of the collective agreement, made by one employed and working under it, would permit, and indeed encourage, the violation of the "Treaty", *Yazoo & M. B. R. Co. v. Webb*, 64 F. (2d) 902, and therefore should not be permitted. By such means the entire structure of the collective agreement could be broken down. If changes may be effected in sixteen instances out of three hundred, they may be multiplied until one-hundred and sixty changes may be effected, and what began as an agreement of the majority be reduced to the contract of a minority. If changes in compensation may be made, other conditions may be required which could well result in the nullification of the employee's right to freely choose his representative for collective bargaining and the adjustment of disputes. It is not difficult to conjecture the difficulty of maintaining the social peace between interstate rail carrier-employer and its employees, so plainly sought by the statute, if varying contracts of compensation existed between those in similar employment, and if such employees be held accountable for any yielding to the mass power of the employer directed against him as an individual. Con— has declared such matters to be impressed with a public interest, and any individual agreement is not a matter of concern alone to the contracting parties.

It may be here remarked that Congress doubtless had in mind that what might be denominated individual "agreements" are frequently such in form only, without any sub-

stance. It is not improper, especially in such matters of public interest, to look beyond the form to discover the truth. Serious doubt of actual uninfluenced agreement may be frequently presented when one "agrees" to less than he is entitled to receive by existing contract. This is true here, as is presented by the fact that within a few months after one such agreement the employee, through his representative in the original contract, was strongly asserting his claim for compensation as originally provided, notwithstanding his recent individual agreement. No criticism of the employer is implied further than the statement that it failed to perceive the scope of the statute, or mistakenly assumed it was not bound by the collective agreement of 1917.

The policy of the statute contemplates collective agreements and forbids individual agreements by those subject to the terms of the collective agreement. If Courts are permitted to pass upon and determine the validity of separate and individual agreements in the light of the circumstances surrounding their making, diverse rulings would undoubtedly result in what would be in effect the validating of contracts in some instances by judicial construction and in others destroying identical contracts, depending upon the individual opinion entertained by the Judge hearing the cause of the bona fides of the employer and employee in providing other and different terms of employment and compensation than those provided by the collective agreement. As a matter of law, in such an instance, either the Railroad Labor Act forbids contracts with employees covered by a collective agreement, except such as be negotiated in accordance with its terms, or else it permits individual agreements without regard to the circumstances attending their execution. If the right of individual contracts, regardless of the existence of a collective agreement, exists, in the nature of the case Courts are concerned only as a matter of general contract law and

without regard to the purpose and provision of the Railroad Adjustment Act. Furthermore, if Courts may determine in any particular case whether the individual contracts in question are sufficiently numerous or important to destroy the collective agreement by "piecemeal", then the judgment of the Court is, without any express authority, substituted for the judgment of Congress and the question of whether employees are entitled to the benefits of collective bargaining by their chosen representatives may well become dependent, not upon the terms of the statute, but upon the varied and diverse judgments of the Courts, dependent in each case upon whether a Judge hearing any particular case determines that the individual agreements are made in good faith, and whether they are sufficiently numerous to dissipate the effect of the collective agreement. This is not consonant with the express and positive declaration of Congress in its purpose by the passage of the Railroad Adjustment Act to provide the right of self-organization and of uncoerced designation by employees of their representatives through whom they may bargain collectively. Clearly the statute determines the importance of collective bargaining in maintaining amicable relations between employer and employees engaged in commerce and adopts this plan of contracting as essential to the carrying out of the Congressional determination. While as held in the *Virginian Railway case*, 300 U. S. 515, 81 L. Ed. 789, the carrier is not precluded from making individual contracts directly with individual employees, still when such a collective agreement has been made the policy of the Act forbids the making of other and different contracts with individuals subject to the collective contract who have designated representatives, except after negotiation with such representatives. Indeed, it is not an onerous requirement of the employer and presumably where changes in business conditions, etc., arise at particular locations, such as appears to be true in the present instances involved in this case, there

would be no difficulty in reaching a satisfactory adjustment of the general contract applicable to the particular location. It is presumed that the representative is familiar with the entire situation and, considering the composite nature of the agreement, can judge the interest and effect of individual action from a broader viewpoint than can the individual. No point is here made that any of the individuals have retracted or attempted to retract their designation of representative.

The finding of the Adjustment Board that the agreements reducing the scheduled commission rates were a violation of the collective agreement and invalid is correct in law and is sustained.

After the propounding of a question by the Court upon the hearing, defendant argues here the validity of notices sent to each joint agent in the Spring of 1930, notifying them that the commission rate of car-load shipments was reduced to $5.00 per car. This notice was not in compliance with the terms of the Railway Labor Act of 1926, in effect at that time. It purported to be effective immediately, thus not giving the required thirty days' notice and failed to give the time and place for conferences between the representatives of the parties interested in such intended changes. It was therefore impossible to provide the time for conferences provided by the Act. Thus without regard to the question as to whether the notice should have been served upon the bargaining representative or the employees, the notice failed to comply with this important provision of the statute and could well be disregarded by the employees. This action by the carrier, as well as the negotiation of the individual agreements, doubtless resulted from the position of the carrier that it was not bound by the 1917 agreement, and its further position, now abandoned, that no employer-employee relationship existed between it and the joint agents.

These questions having been determined adversely to the carrier's contention, the means then employed to obtain relief from what it deemed to be burdensome terms of employment, are rendered ineffectual, and the defendant carrier is obliged to comply with the terms of the award as sought to be enforced in this proceeding, with the exception now stated.

One instance of dispute, apparently involving $167.11, stipulated here was not presented in any way to the Board, and, therefore, in this suit for enforcement of the award, presents no question for adjudication. This related to the formula to be used in calculating commission on the previous year's business at a station which is seasonal, i. e., not open each month.

This presents neither the question of reduction in commission nor individual agreement, but construction of the agreement of August 1917, a question not within the claim or the award and, therefore, not within the scope of this suit, which is admittedly predicated only upon the award. Accordingly, the claim arising at Meggets, S. C., asserted by or in behalf of H. D. McPherson and C. B. Copeland, is dismissed without prejudice.

It follows from the above that the plaintiff is entitled to an order requiring restoration of the rates of commission provided by the agreement of August 1, 1917, and the maintenance of such schedule commission payments until they are changed in accordance with the provisions of such agreement.

Judgment will be entered for the remaining twenty plaintiffs in the amounts stipulated, the form of which may be presented after notice, and at the time of entry a rea-

sonable attorneys' fee will be fixed in accordance with the statute.

This June 26, 1942.

ROBERT L. RUSSELL,
United States District Judge
Northern District of Georgia.

Filed June 26, 1942.

313

FINDINGS OF FACT.

(Title Omitted.)

(1) There is evidence to support the finding, award, and order of the Third Division of the National Railway Adjustment Board sued upon by the plaintiff and attached to the Petition as Exhibit "A".

(2) The remaining facts are stipulated by the parties in the Stipulation of Facts filed in the Clerk's office of this Court June 8, 1941.

CONCLUSIONS OF LAW.

(1) This Court has jurisdiction of this case.

(2) The Third Division of the National Railway Adjustment Board had jurisdiction to hear and determine the claim filed by the General Chairman of the Order of Railway Telegraphers.

(3) The contract effective Aug. 1, 1917, between the Southern Express Co. and the representatives of the joint

agents, attached to the Petition as exhibit "B", is obligatory upon the Railway Express Agency, Inc.

(4) The award of the Railway Adjustment Board sued upon, considered in connection with the facts stipulated by the parties in the present suit, is sufficiently definite to support the present suit.

(5) The finding of the Railway Adjustment Board that the individual agreements entered into between the Railway Express Agency, Inc. and the joint agents in whose behalf this suit is prosecuted, were invalid because in violation of the existing collective agreement, finds support in the facts and is correct in law.

(6) The notices mailed to the joint agents in March and April of 1930, by the officials of the Railway Express Agency, Inc., as stipulated in paragraphs 7, 8, and 9 of the stipulation of Facts, were ineffectual to change the agreement of August 1, 1917.

(7) The defendant should be required to restore the rates of commission required by the agreement of Aug. 1, 1917, and maintain such rates of commission payments according to the terms of such agreement.

(8) The plaintiff is entitled to recover judgment for each of the joint agents referred to in the petition and the Stipulation of Facts, except H. D. McPherson and C. B. Copeland, for the amount stipulated and set forth in the Stipulation of Facts with reference to such parties.

This June 26, 1942.

ROBERT L. RUSSELL,
United States District Judge
Northern District of Georgia.

Filed 26th day of June, 1942.

314 ORDER AMENDING FINDINGS OF FACT.

This action having been tried by the Court without a jury, upon motion of the plaintiff, the Court hereby amends its Findings of Fact by striking therefrom the second Finding of Fact as follows:

"(2) The remaining facts are stipulated by the parties in the Stipulation of Facts filed in the Clerk's Office of this Court June 8, 1941."

and the Court hereby makes additional Findings of Fact as follows:

(2) There was a dispute or case pending between the plaintiff and the defendant on June 21, 1934, and the Third Division of the National Railroad Adjustment Board had jurisdiction of the parties and the subject matter within the terms of the Railway Labor Act as amended June 21, 1934.

(3) The Agency assumed, became subject to, and is bound by the agreemnt of August 1, 1917, and the order of the Third Division of the National Railroad Adjustment Boafd which required the agency to pay a sum equalling the difference between the compensation specified by the contract and that actually paid under the individual agreements is not arbitrary and unreasonable.

(4) The Agency, under its admissions in the Stipulation of Facts filed in the Clerk's office of this Court on June 8, 1941, is indebted to the several joint agents named in the petition in the amounts therein stipulated, except there is no liability under the terms of the award as to H. D. McPherson and C. B. Copeland.

(5) The individual contract between C. Dinkins and the Agency for maximum commission on shipments of refrigerated carloads of strawberries from Lawtey, Florida, is contrary to the terms of the agreement of August 1, 1917. This individual contract was not negotiated with or ratified by the General Committee representing the joint agents, and is invalid.

(6) The award and order of the Third Division of the National Railroad Adjustment Board sued upon are not arbitrary. Sufficient findings of fact were made by the board to support its award. There was substantial evidence before the board to support or authorize the findings, award and order of the board that (a) the defendant was bound by the contract of August 1, 1917; (b) that the contract was breached when defendant reduced the compensation provided for in said agreement; and (c) that there was a pending dispute which gave the board jurisdiction to make the award and issue an order thereon.

(7) No notice was given by the agency to the representatives of the joint agents of the carrier's intention to change the terms of the agreement of August 1, 1917, as provided in Article 14 of the agreement, nor was any notice given in compliance with the terms of Section 6 of the Railway Labor Act of 1926, in effect at that time.

This the 3rd day of August, 1942.

ROBERT L. RUSSELL,
United States District Judge.

Filed Aug. 3, 1942.

316 JUDGMENT.

(Title Omitted.)

This action came on to be tried by the Court and the Court having taken evidence and having made special findings of fact and conclusions of law, it is

Adjudged, that the findings and Award No. 548 of the Third Division of the National Railroad Adjustment Board upon the whole record and all the evidence was proper and valid and the same is hereby in all particulars sustained; and it is further

Adjudged, that the plaintiff is entitled to have the Order of the Third Division of the National Railroad Adjustment Board, dated December 15, 1937, ordering the defendant to make Award No. 548 effective, enforced; and it is further

Adjudged, That The Defendant Restore the rates of compensation established by the agreement of August 1, 1917; and maintain such rates of compensation payments according to the terms of such agreement; and it is further

Adjudged, that the plaintiff have judgment against the defendant for the joint agents named in the petition in the amounts specified opposite their names, as follows:

L. F. Johnson	$ 38.70
T. P. Barber	355.86
W. J. Benton	41.10
M. J. Stokes	499.34
J. L. Williams	451.30
T. F. Womble	216.75
C. B. Holmes	602.90
R. H. Turner	239.36
Paul Smith	664.53

E. Meares	379.72
J. A. Walker	188.00
J. T. Williams	114.55
T. C. Crayton	54.93
J. H. Payne	565.56
C. Dinkins	40,100.87
D. G. Stutz	674.14
O. H. Smith	195.32
A. T. Walker	530.60
H. A. Borst	1,740.33
C. F. Carlton	1,420.10

as principal due said agents up to and including December 31, 1939, and interest thereon to June 30, 1942, together with interest on said amounts at the rate of 7% per annum from this date until said amounts are fully paid; and it is further

Adjudged, that Plaintiff have judgment for the costs of this action, to be taxed by the Clerk of this Court against the defendant. And this cause is also retained with the privilege to this Court to make allowance to Attorneys for Plaintiff in the event this judgment becomes final.

Let this judgment be filed and entered by the Clerk of this Court.

Done at Atlanta, Georgia, as of the 3rd day of August, 1942.

ROBERT L. RUSSELL,
United States District Judge.

Filed Aug. 3, 1942.

317 NOTICE OF APPEAL.

(Title Omitted.)

Notice is hereby given that Railway Express Agency, Incorporated, defendant in the above stated case, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit, from the final judgment of the Court entered in this action on the 3rd day of August, 1942.

This 30th day of September, 1942.

A. M. HARTUNG,
BLAIR FOSTER,
Attorneys for Railway Express Agency, Incorporated.

Filed Sep. 30, 1942.

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318 NOTICE OF FILING RECORD, ETC.

(Title Omitted.)

To William G. McRae and Leo J. Hassenauer, Attorneys for Plaintiff in the Above Stated Case:

Please take notice that we are filing in the above stated matter, and attach hereto copies of, (1) a designation of the portions of the record to be included on appeal; (2) a condensed statement in narrative form of the material parts of the testimony, including the documentary evidence and exhibits, and of the proceedings on the trial; and (3) a

statement of the points upon which we intend to rely on appeal.

This 9th day of October, 1942.

A. M. HARTUNG,
BLAIR FOSTER,
Attorneys for Appellant, Railway Express Agency, Incorporated.

Fled Oct. 9, 1942.

ACKNOWLEDGMENT OF SERVICE.

Service of the within and foregoing notice and of the instrument and statements therein referred to is acknowledged.

This 9th day of October, 1942.

WM. G. McRAE,
L. J. HASSENAUER,
Attorneys for Appellee, The Order of Railroad Telegraphers.

Filed Oct. 9, 1942.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL.

319 (Title Omitted.)

Comes now Railway Express Agency, Incorporated, and gives notice that it will rely upon the following points on the appeal in the above stated matter, to wit:

The findings of fact as originally made by the Court and as amended and supplemented and the conclusions of

law, and the judgment of the Court are without evidence to support them, or any of them; they are strongly and decidedly against the weight of the evidence; they are contrary to law and the principles of equity.

Specifically defendant will rely upon the following points:

A. That the defendant did not assume, did not become subject to, and is not bound by the agreement of August 1, 1917, and the order of the Third Division of the National Railroad Adjustment Board, which required the defendant to pay a sum equalling the difference between the compensation specified by the contract and that actually paid under the individual agreements, is arbitrary and unreasonable. That the evidence did not warrant the Court in finding otherwise and in fact compelled such a finding as is here stated.

B. That the defendant, under the statements made and agreed to in the Stipulation of Facts filed in the clerk's office of the District Court on June 8th, 1941, is not indebted to the several joint agents named in the petition in the amounts therein stated or in any other amount whatever.

C. That the individual contract between C. Dinkins and the defendant for maximum commissions on shipments of refrigerated carloads of strawberries from Lawtey, Florida, is not contrary to the terms of the agreement of August 1, 1917, nor prohibited by it and that this individual contract is valid.

D. That the award and order of the Third Division of the National Railroad Adjustment Board sued upon is arbitrary. That there were insufficient findings of fact made by the board to support the award. That there was

not sufficient substantial evidence before the board to support or authorize the findings, award and order of the board, that (a) the defendant was bound by the contract of August 1st, 1917; (b) that the contract was breached when the defendant reduced the compensation provided for in said agreement; and (c) that there was a pending case which gave the board jurisdiction to make the award and issue the order thereon.

E. That the notice given by the defendant to all of the joint agents advising them of defendant's intention thereafter to pay a commission different from that set forth in the agreement of August 1st, 1917, was effectual to modify and change the terms of that agreement, even though it be supposed that the agreement of August 1st, 1917, was binding upon defendant when said notice was given.

F. That none of the conclusions of law stated by the Court and numbered 2 through 8 are sound, nor are they consonant with or warranted by the evidence in the case, either that which was before the National Railroad Adjustment Board or before the Court, and that the evidence before both tribunals required the Court to reach conclusions of law exactly contrary to those stated by the Court.

G. That the judgment of the Court finds no support either in the evidence before the National Railroad Adjustment Board or before the Court itself and that all of the evidence in the case required a judgment for the defendant and in particular a judgment that:

1. The findings and award 548 of the Third Division of the National Railroad Adjustment Board is invalid;

2. The plaintiff is not entitled to have the order of the said Board, dated December 15, 1937, enforced;

3. The contract of August 1, 1917, between the joint agents and the Southern Express Company was not binding on this defendant;

4. The joint agents named in the suit be denied and recovery at all against this defendant; and

5. That there was not, as to any of the joint agents named in the suit and in whose behalf the Court rendered money judgments, a case pending and unadjusted on June 21, 1934.

H. That even though all contentions of defendant be adjudged against it so that the agreement of August 1, 1917, be considered as binding upon this defendant, and that defendant was not at liberty in any event to make individual contracts at variance therewith the joint agents, yet in the cases of T. P. Barber, W. J. Benton and L. F. Johnson, at Fairfax, South Carolina, and C. F. Carlton, at Boykins, Virginia, the separate agreement made with them by defendant did not contravene any requirement of the contract of August 1st, 1917, with respect to minimum compensation payable to the joint agents.

I. That even though the contentions of defendant respecting the existence of a pending case or pending cases on June 21, 1934; the lack of binding effect upon it of the contract of August 1st, 1917; the effectiveness of the notice to all joint agents; and the validity of the individual contracts with the joint agents, all should be adjudged against it, yet the Court, in rendering judgment for the several joint agents in the amounts set opposite their respective names, has failed to apply the applicable statute of limitations pleaded specially by the defendant.

A. M. HARTUNG,
BLAIR FOSTER,
Attorneys for Appellant, Railway Express Agency, Incorporated.

Filed Oct. 9, 1942.

323 SUPERSEDEAS BOND.

(Title Omitted.)

Know All Men By These Presents, That Railway Express Agency, Incorporated, as principal, and St. Paul Mercury Indemnity Company of St. Paul, as surety, are held and firmly bound unto The Order of Railroad Telegraphers, its successors and assigns, in the sum of Fifty-Five Thousand Dollars ($55,000.00) for the payment of which well and truly to be made we bind ourselves, our successors and assigns firmly by these presents. Sealed with our seals, and dated this 30th day of September, 1942, in the year of our Lord one thousand nine hundred and forty-two.

Whereas, lately at the present term of the United States District Court for the Northern District of Georgia, in a suit depending in said Court between the Order of Railroad Telegraphers, plaintiff, and Railway Express Agency, Incorporated, defendant, judgment was rendered against the said defendant. and the said Railway Express Agency, Incorporated, has appealed from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit

Now the condition of the above obligation is such that, if the said Railway Express Agency, Incorporated, shall prosecute said appeal to effect, and satisfy the judgment in full together with costs, interest, and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest, and damages as the said Appellate Court may adjudge and award, if it fail to make good its appeal, then the above

obligation to be void, else to remain of full force and effect.

(Seal) RAILWAY EXPRESS AGENCY INCORPORATED,
By BLAIR FOSTER,
Its Attorney, Principal.

(Seal) ST. PAUL MERCURY INDEMNITY COMPANY OF ST. PAUL,
By K. E. ALBRECHT,
Security.

Approved this 1st day of October, 1942.

ROBERT L. RUSSELL,
United States District Judge.

Filed Oct. 2, 1942.

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324 SUPERSEDEAS ORDER.

(Title Omitted.)

The defendant in the above stated case, having filed a notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and having presented to the Court for its approval a supersedeas bond, conditioned as required by Rule 73(d) of the Federal Rules of Civil Procedure, and such bond having been approved by the Court,

Now, Therefore, It Is Ordered that upon the filing of the aforesaid bond with the clerk of this Court all further proceedings upon the judgment rendered and entered in

this case against the defendant are thenceforth stayed and said judgment superseded, pending the appeal.

This 1st day of October, 1942.

ROBERT L. RUSSELL,
United States District Judge.

Filed Oct. 2, 1942.

DESIGNATION OF CONTENTS OF RECORD PROCEEDINGS AND EVIDENCE ON APPEAL.

325 (Title Omitted.)

Comes now Railway Express Agency, Incorporated, appellant in the above stated matter, and designates for inclusion in the record on appeal the following portions of the record, proceedings and evidence:

1. The material pleadings consisting of the complaint, the answer and the two amendments filed thereto by the defendant, but omitting from the complaint the exhibits and portions of exhibits attached thereto as follows, to wit:

Omit the entire exhibits designated:

Exhibit C; Exhibit D; Exhibit G; Exhibit H; Exhibit J; Exhibit K; Exhibit L; Exhibit M; Exhibit Q; Exhibit R; Exhibit S; Exhibit T; and Exhibit W;

Omit all of the exhibit designated Exhibit N, except sheet numbered 20 which is a summary of the preceding 19 pages.

2. The condensed statement in narrative form of the testimony, which includes therein the Stipulation of Facts entered into by the parties, together with abridged copies of the exhibits therein referred to, and which statement also includes, in narrative form, a statement of the proceedings on the trial.

3. The opinion of the Court.

4. The findings of fact and conclusions of law together with the direction for the entry of judgment thereon, dated June 26, 1942.

5. The amended and additional findings of fact and the conclusions of law made and entered on the 3rd day of August, 1942.

6. The judgment of the Court made and entered on the 3rd day of August, 1942.

7. The notice of appeal with date of filing thereon.

8. This designation of contents of record on appeal.

9. The statement by appellant of the points upon which it intends to rely.

A. M. HARTUNG,
BLAIR FOSTER,
Attorneys for Appellant, Railway Express Agency, Incorporated.

Filed Oct. 9, 1942.

327 CLERK'S CERTIFICATE.

United States of America,
Northern District of Georgia, ss.

I, F. L. BEERS, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 326 pages contain a true, full, complete and correct copy of the original record, statement of points and all proceedings had in the matter of Railway Express Agency, Incorporated, Appellant, vs. The Order of Railroad Telegraphers, Appellee, as specified in the designation of contents of record by counsel herein, and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 12th day of November, 1942.

F. L. BEERS,
(Seal) Clerk, United States District Court Northern District of Georgia.
By C. A. McGREW,
(C. A. McGrew)
Clerk.

[fol. 369] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz.:

ARGUMENT AND SUBMISSION

Extract from the Minutes of May 5th, 1943

No. 10509

RAILWAY EXPRESS AGENCY, INCORPORATED

versus

THE ORDER OF RAILROAD TELEGRAPHERS

On this day this cause was called, and, after argument by Blair Foster, Esq., for appellant, and William G. McRae, Esq., for appellee, was submitted to the Court.

[fol. 370] OPINION OF THE COURT—Filed July 9, 1943

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10509

RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant,

versus

THE ORDER OF RAILROAD TELEGRAPHERS, Appellee

Appeal from the District Court of the United States for the Northern District of Georgia

(July 9, 1943)

Before Sibley, Hutcheson, and McCord, Circuit Judges

HUTCHESON, Circuit Judge:

The suit, in form to enforce an award of the National Railroad Adjustment Board, was for the compensation claimed to be due and unpaid various railroad agents under

the contract made August 1, 1917 [1] between the Southern [fol. 371] Express Company and the General Committee of the Order of Railroad Telegraphers in behalf of joint railway express agents on the Seaboard Air Line Railway. The claim was that the facts and law were as the Board had found; that the defendant, though not a signer of, had, as successor to the Southern Express Company, assumed or otherwise become obligated to carry the contract out; that, without effecting a change of the rates the contract fixed

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[1] The provisions of this contract material here are:

"Effective 8-1-17, the following rules and rates of pay will govern the Southern Express Company's Agents who are jointly employed as railroad and express agents.

Article 1

This schedule applies solely to express agents as above designated.

Article 2

Commissions on total business received and forwarded, based on previous year's business, will be paid as follows:

When commissions do not exceed fifty dollars per month, ten per cent.

When commissions exceed fifty dollars per month, but not more than seventy-five dollars per month, nine per cent.

When commissions exceed seventy-five dollars per month, but not more than one hundred dollars per month, eight per cent.

When commissions exceed one hundred dollars per month, seven per cent.

When commissions do not exceed ten dollars per month a guarantee of ten dollars per month will be paid.

Article 3

At points where Agents are required to transfer express matter to or from other lines or trains, they will be paid a minimum of ten dollars ($10.00) per month for such service.

Article 5

All grievances and claims for loss or damage arising between the Southern Express Company and its Agents herein represented, which cannot be satisfactorily adjusted otherwise may be referred to the Superintendent and Gen-

by giving the thirty days notice in writing provided for in [fol. 372] it, it had in three respects [2] changed the basis of compensation provided for in the contract; and that it was liable to the agents in whose interest the suit was brought for the difference between the amounts which had actually been paid them and the amounts which, under the contract, should have been paid them. Defendant denied the jurisdiction of the board on the grounds that (a) the claimants were not employees; and (b) the claim was not with regard to a claim pending and unadjusted on June 21, 1934. It defended on the merits that: (a) The August 1, 1917 contract was not its contract by execution, assumption or otherwise, and it was not and is not bound by its terms; (b) If mistaken in this, it was not liable for any of the amounts sued for because the sums paid each of the agents were paid him under a contract with him, and were paid to, and received, and retained by him as his part of the receipts in full and complete satisfaction of amounts due him for the serv-

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eral Chairman representing such employees for adjustment, with the right of appeal reserved provided an amicable adjustment cannot be so reached.

Article 9

Agents will be allowed to deduct their commissions at the close of each report.

Article 12

These rules are not to be construed so as to reduce compensation at points where the rates of pay are in excess of the above rates.

Article 14

No change will be made in the foregoing articles until after notice of thirty (30) days in writing, has been given.

[2] (1) Though the contract made no provision for doing so, it had, by notice to all joint agents on the Seaboard Railway, including those at points in Florida known as strawberry shipping points, instituted and paid on all carload shipments a flat rate of $5.00 per car instead of the commission rate provided for in Article 2. Claims under this head are those of Dinkins, Agent at Lawtey, Florida, $38,744.41; Paul Smith, $445.99; R. H. Turner, $169.80; D. G. Stutz, $539.14; O. H. Smith, $161.30; Borst, $1513.23; Meares, $330.22. (2) Though Art. 2 had guaranteed a

ice rendered under the contract he had with it; (c) As to Dinkins, agent at Lawtey, Florida, and the others under group one, it defended further on these grounds: that prior to the arrangement made in 1929 between the Seaboard Air Line and it for handling berries under refrigeration in carload lots, there was no carload express business in such perishables; that the 1917 contract, therefore, did not purport to cover compensation for that business; and that before making the amended agreement with the railroad to handle perishables by carload express, instead of installing its own exclusive agent at Lawtey, and compensating him on a salary basis, as it notified Dinkins it would do, it, on Dinkins' request that it not make the change, and his agree- [fol. 373] ment that he would handle these cars not on a commission basis but at a flat rate of $5.00, accepted Dinkins' offer, and, thereafter, paid him $5.00 per car, that is, thereafter, Dinkins deducted his commission from the express receipts and withheld and accepted them as full compensation for services rendered in connection with carload shipments; and that all of the other agents claiming in this group made the same arrangement; (d) The Statute of Limitation of Six Years.

The district judge sustained the board's assertion of jurisdiction, its finding of fact that defendant had assumed and was obligated on the Southern Express contract, its conclusion of law that the individual arrangements made with the agents under which the traffic was handled and the compensation paid were invalid and ineffectual to relieve defendant from the payment of the compensation pro-

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minimum commission of $10.00 per month, the defendant through individual agreements between the defendant and the agents involved had abolished this minimum. Under this head comes M. J. Stokes, $39.54, J. L. Williams, $325.79, J. E. Walker, $138.75, J. T. Williams, $88.59, I. G. Croyton, $43.27, J. H. Payne, $489.61, C. B Holmes, $521.99, A. T. Walker, $451.50. (3) That though Art. 3, fixed a minimum of $10.00 per month for transfer services and Art. 12 stated that the rules are not to be construed to reduce compensation at points where the rates of pay are in excess of the above rates, the defendant has reduced transfer allowances. Coming under this head are Barber, $308.12, Benton, $30.00, Johnson, $30.00, M. J. Stokes, $305.00, T. J. Womble, $150.00, C. F. Carlton, $1235.00.

vided for therein, and without finding on, but disregarding, the defense of limitation, he gave judgment as to each claimant for the amounts sued for under the three heads.

Here, abandoning its claim that the agents concerned were not in its employ, defendant urges, as it did below, that the board was without jurisdiction of the claims because they were not in 1934 pending and unadjusted disputes, and further insists that the suit was wrongly decided upon its merits.

[fol. 374] We cannot agree with appellant that the board was without jurisdiction. It is true that as to complaints under groups (2), the abolition of the guarantee, and (3), the reduction of transfer allowances, no complaints were filed with defendant before, and therefore none were pending and unadjusted, on June 1, 1934. But it is equally true that there were claims under this head presented to the board covering grievances for years after June 1, 1934, over which the board undoubtedly had jurisdiction, sufficient to support its findings. As to claims under group (1), the institution in respect of express shipments of the $5.00 per car flat rate, while it is true that the record shows before June 1, 1934, only one complaint filed and that in respect of Dinkins only, and only for one year, this was sufficient to constitute a pending and unadjusted complaint as to the rights under the contract of Dinkins and other express agents affected by the change. Besides the complaint under this head also included many years after June, 1934. Neither can we agree with appellant that the board's finding that it assumed the obligations of the 1917 contract is without support in the record. It is true that the evidence to this effect is not as full as might have been expected if the contract was actually in force and that it is contrary to not only the oral evidence of the express company's officers that they never assumed the contract but to the letter of McFarland, the general manager of the Railway Express Company,[3] which in turn is consistent with the position Mr. Owens and Mr. Glyn for the company took in 1935, when

[3] In his letter of June 15, 1925, he said that the American Railway Express Agency had no agreement with the Order of Railroad Telegraphers, but the Southern Express Co. did have one and this company had perpetuated the rates of commission as therein provided.

written to by Thompson, chairman of the O. R. T. about matters he claimed were pending, and with the statement in Thompson's claim before the board that the company takes the position that "our organization has no agreement [fol. 375] with the company". But it is equally true; that the O. R. T. was all along insisting that it did have the contract; that the compensations fixed in it, except where changed by special agreement, were recognized and paid by the company; and that the record contains correspondence between Scruggs, Supt. of the Express Company, and May, general chairman of the Telegraphers, in October, 1925, about claims with no suggestion on the company's part that May was not authorized to present them, but, on the contrary, with a request by Scruggs that May, as general chai-man, see that agents who had overpaid themselves from company funds be required to make restitution. There is, too, correspondence in 1930, 1931 and 1932 between Bryant, vice-president of the O. R. T., Smith of the Railway Express Agency and Frank Morgan of the Alabama Public Service Commission, stating that the company did have a contract with the O. R. T. with no denial by the company that such a contract existed. We cannot say, when all of this evidence is considered, that the board's finding that the company in fact assumed, and operated under, the contract is without support in the evidence.

When it comes to the merits, though, the matter stands quite differently. In *Yazoo vs. Webb*, 64 Fed. (2) 902, *I. C. R. R. Co. vs. Moore*, 112 F. (2) 959, and *System Federation vs. L. & A. Ry. Co.*, 119 F. (2) 509, we have canvassed, and carefully set down our conclusions as to, the state of the law governing suits on contracts between employers and unions of the nature of the September 17th contract made the basis of this suit, and, without restating them at any length, we refer to those cases for the general principles controlling here. They hold that persons employed under the terms of such a contract have their tenure and rights governed by its terms and that for action taken contrary thereto, to their damage, there is a right of action in them or in the union to redress their grievances. They do not hold that contracts so made are binding on individual em- [fol. 376] ployees beyond their power to change the terms by individual contracts with their employer. On the contrary, their holding is "In the absence of any special agreement otherwise, every employment may be presumed to be

on the basis of the collective agreement and to adopt its terms, but ordinarily there is nothing to prevent a special agreement if an employee desires it", *I. C. vs. Moore, supra,* at page 964, and that "The collective agreement as such is made, defended, and changed by the union, but the rights of each employee employed under it are his own, and he may waive or assert them himself as he see fit", id. 965. Cf. *Virginian Ry. vs. Federation,* 300 U. S. 548-9, where it is said:

> "We think, as the Government concedes in its brief, that the injunction against petitioner's entering into any contract concerning rules, rates of pay and working conditions, except with respondent, is designed only to prevent collective bargaining with any one purporting to represent employees, other than respondent, who has been ascertained to be their true representative. When read in its context it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent, but not as precluding such individual contracts as petitioner may elect to make directly with individual employees. The decree, thus construed, conforms in both its affirmative and negative aspects, to the requirements of § 2."[4]

[fol. 377] *Yazoo vs. Webb, supra,* is further illustrative. There the general contract furnished the basis of Webb's hiring, but his acceptance of a less amount under circumstances constituting an agreement between him and the company that that was all that was due him prevented his recovering more.

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[4] National Licorice Co. vs. Labor Board, 309 U. S. 350 and N. L. R. B. vs. Case Co., 134 F. (2) 72, writ of certiorari granted, are not to the contrary. They deal with the assertion of public not of private rights. "Here the right asserted by the board is not one arising upon or derived from the contracts between petitioner and its employees. The Board asserts a public right vested in it as a public body charged in the public interest with the duty of preventing unfair labor practices", 309 U. S. at 364. Cf. Agwilines, Inc. vs. N. L. R. B., 87 F. (2) 146, N. L. R. B. vs. Williamson-Dickey, 130 F. (2) 263, Fleming vs. Belo, 121 F. (2) 214 and note 9.

If then we could agree with appellee that the case is simply one where, without compliance with the provisions of the contract for changing it, appellant and each employee affected had by individual agreement changed its terms, and the company had thereafter paid, and the employees accepted, compensation, not on the terms provided in the general contract, but upon those especially agreed upon, this would not avail appellee. For it is quite clear that having agreed to accept and having accepted in full satisfaction for the services rendered the amounts paid them, neither the employees for themselves nor the union for them has any right of action to recover more. But, except as to the claims under group two, the abolition of a guaranteed minimum of $10.00 a month, and as to the claims of Stokes and Womble under group three, the reduction of transfer allowances, the case does not stand that way. As to the claims of Barber, Benton, Johnson and Carlton under group three, the special agreements made with them were not in violation of the contract, for the transfer allowances were not reduced below $10.00, the minimum fixed in Art. 3 of the contract, but as to the first three, from $25.00 to $20.00, and as to Carlton, at first from $25.00 to $20.00 and later to $15.00. Appellee's contention that Art. 12 operates to raise the minimum above the $10.00 fixed in Art. 3 will not do. Such a provision either in a contract or in a statute is without effect to prevent changes in agreed rates of compensation so long as those changes do not fall below [fol. 378] the minimum the contract or statute fixes.[5] As to the claims in group one, there was no violation of the contract, because, under the undisputed evidence, carload express shipments of perishables were not within the contemplation of the contracting parties and were not included within its terms. Indeed they were not instituted until 1929. Further, if it be considered that the contract does cover such business, the written notice given to every joint agent, including Meares, local chairman for the division and

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[5] Cf. Sec. 18, Fair Labor Standards Act, 29 U. S. C. A., Sec. 218 as construed in Walling vs. Belo, 316 U. S. 630, note 6; White vs. Witmer, 132 F. (2) 108, Tinerella vs. Des Moines, 41 Fed. Sup. 798, Remer vs. Czaja, 36 Fed. Sup. 629.

by him to the general chairman,[6] and the securing of the consent to the arrangement of each agent affected, was the substantial equivalent of the notice provided for in Art. 14. And still further, in the case of Dinkins, to hold appellant liable now for the extortionate commissions he claims would be to permit Dinkins to profit by his own wrong and grossly and unjustly enrich him, contrary to his agreement, to his conduct under it, and to appellant's action on it, that if it did not, as it had a right to do, and as it had already done at Starke, establish at Lawtey an exclusive salaried agent, he would handle carload shipments at $5.00 per car. The other claims under this group, while not so shocking in amount, are ruled by the same principle. Finally while, if we are correct in our view that there can be no recovery, the question whether the statute of limitations of [fol. 379] six years is a bar to the action in whole or in part is immaterial, we think we should say that we are in no doubt that the bar of the statute has fallen as to all of the amounts sued for which accrued more than six years before the suit was filed. The judgment is reversed and the cause is remanded for further and not inconsistent proceedings.

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[6] On June 16, 1930, Meares, Local Chairman for the Division wrote Mr. Harrison as follows: "Referring to our conversation this A. M. relative to previous handling on separation of express agency at this point. Beg to say that I will go ahead on the commission on carload shipments of $5.00 per car and that I am not handling the matter further with the committee which represents us as agents over the Seaboard Sys., will state that I did in Apl. send our general chairman advice as to the instructions from Supt. May in regards to the $5.00 commission on car load lots, however, I do not know whether he ever handled the matter or not and I do not know whether he intends to handle the matter. I give the Genl. Chm. advice regarding the above as it was one of my duties as Local Chairman for this Divn. of Agent to keep the Genl. Chm. posted of anything that concerned us as Agents over the Seaboard. I hope this explanation will be satisfactory to all concerned."

[fol. 380] JUDGMENT

Extract from the Minutes of July 9th, 1943.

No. 10509

RAILWAY EXPRESS AGENCY, INCORPORATED,

versus

THE ORDER OF RAILROAD TELEGRAPHERS.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;

It is further ordered, adjudged, and decreed that the appellant, Railway Express Agency, Incorporated, recover its costs of appeal, to be paid out of the appropriation for the expenses of the Courts of the United States as provided by Section 153 (p) of the Railway Labor Act, (45 U. S. C. A.).

[fol. 380a] JUDGMENT

Extract from the Minutes of July 9th, 1943.

No. 10509

RAILWAY EXPRESS AGENCY, INCORPORATED,

versus

THE ORDER OF RAILROAD TELEGRAPHERS.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;

It is further ordered, adjudged, and decreed that the appellee, The Order of Railroad Telegraphers, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 381] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 369 to 380, next preceding this certificate, contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 10509, wherein Railway Express Agency, Incorporated, is appellant, and The Order of Railroad Telegraphers is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, numbered from 1 to 368, are identical with the printed record upon which said cause was heard and decided in the said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 22nd day of July, A. D. 1943.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal.)

[fol. 382] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 18, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for argument immediately following No. 28, Brotherhood of Railroad Trainmen, etc. vs. Toledo, Peoria & Western R. R.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 10 1943
CHARLES ELMORE CROPLEY
CLERK

343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

THE ORDER OF RAILROAD TELEGRAPHERS, PETITIONER

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED, RESPONDENT

WILLIAM G. McRAE,
LEO J. MASSENAUER,

Attorneys for
The Order of Railroad Telegraphers,
Petitioner.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

THE ORDER OF RAILROAD TELEGRAPHERS, PETITIONER

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED, RESPONDENT

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, and Brief in support thereof.

Now comes The Order of Railroad Telegraphers, and prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, to review here the record and judgment entered by that court on July 9, 1943 (R. 380).

Opinion Below

The opinion of the Circuit Court of Appeals was entered July 9, 1943 (R. 370-379) and is not yet reported. The opinion of the District Court, Findings of Fact and Conclusions of Law is found in (R. 335-353).

Jurisdiction

The jurisdiction of this Court is invoked under Section

240(a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U.S.C.A. 347, 43 Stat. 938).

Statutes Involved

The suit was brought by The Order of Railroad Telegraphers to enforce an award rendered by the National Railroad Adjustment Board. Such suit was filed in the District Court of the United States for the Northern District of Georgia, under Section 153(p) of the Railway Labor Act, as amended, (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U.S.C. 151 et seq.). Certain provisions of the Railway Labor Act of 1926, c. 347, 44 Stat. 577; U.S.C. Tit., 45 Secs. 151-163, are involved because the change in rates of pay was effected in 1930, in violation of the provisions of Section 6 and related provisions of the Act of 1926.

The portion of the Act of 1926 principally concerned is Section 6, which provides as follows:

> Procedure in Changing Rates of Pay, Rules and Working Conditions.
>
> "Sec. 6. Carriers and the representatives of the employees shall give at least thirty days' written notice of an intended change affecting rates of pay, rules, or working conditions, and the time and place for conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. * * In every case where such notice of intended change has been given or conferences are being held with reference thereto, or the services of the Board of Mediation have been requested by either party, or said board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the Carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Board of Mediation, unless

a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Board of Mediation."

The provisions of the Railway Labor Act (Act of June 21, 1934) herein involved are Section 153, First (i), (p) and (q). The applicable sub-divisions of this section are set forth in the Appendix to this Brief.

In addition the General Duties prescribed in the Act of 1926, are similarly involved:

"Sec. 2. First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purpose of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.

Fourth. In case of a dispute between a carrier and its employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions it shall be the

duty of the designated representative or representatives of such carrier and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided* (1) That the place so specified shall be situated upon the railroad line of the carrier involved unless otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this paragraph shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Fifth. Disputes concerning changes in rates of pay, rules or working conditions shall be dealt with as provided in section 6 and in other provisions of this Act relating thereto."

The sanctions of the criminal as well as the civil law have by Section 2, Tenth of the Act of June 21, 1934, been made applicable, to changes, without thirty days' notice in the rates of pay, rules or working conditions of classes of employees (Section 2, Seventh) (Section 2, Fifth of the Act of 1926), to interferences with labor organizations of employees, (Section 2, Fourth) to coercive attempts to induce employees to join or not to join a labor organization (Section 2 Fourth and Fifth) and to interferences with the designation of representatives (Section 2, Third).

Questions Presented

1. Whether or not Section 6 of the Railway Labor Act of 1926 is to be construed, in its application to the facts of this case, so as to permit a carrier to alter rates of pay, rules,

or working conditions of any of its employees, in effect at the time of the passage of the Act, without first giving at least thirty days' written notice to the authorized and designated representative of the employees of an intended change affecting rates of pay, rules or working conditions, in an effort to reach an agreement as to a time and place for conference between the representatives of the parties interested in such intended changes.

2. Whether or not, where a majority of a craft or class has selected a representative, signatory to an agreement, a carrier is free to make with any one it pleases and for any group it pleases, contracts altering established rates of pay, rules, or working conditions, without notice to or conferences with the designated representatives of the employees involved.

3. Whether or not Section 6 and Section 2, Second and Fourth of the Act of 1926, manifest an intent on the part of Congress that carriers shall confer with representatives of the employees before changing rates of pay, rules or working conditions.

4. Whether or not the conclusion of the court below, to the effect that a group of employees affected accepted compensation, not in the terms provided in the agreement, but upon those fixed by the carrier, deprived the representative organization of a right of action in a suit upon an award under Section 153 (p) of the Act, as amended.

5. Whether or not the conclusion of the court below that the bar of the state statute of limitations has fallen as to all of the amounts due under the terms of the award which accrued more than six years before suit was filed, ousts the jurisdiction of the United States District Court in a suit for an order to enforce an award brought within the statutory period as provided in Section 153 (q) of the Act, as amended.

6. Whether or not the Railway Labor Act of 1926 is to be construed, in its application to the facts of this case, so as to permit any alteration by a carrier of rates of pay, rules, or working conditions, in effect at the time of the passage of the Act, without the carrier exerting every reasonable effort to comply with the requirements of the Act prescribing a brief period of attempted mediation with the representative of its employees designated so to confer in the manner provided by the Act.

7. Whether or not the Railway Labor Act of 1926, imposes a legally enforceable obligation on carriers to give thirty days' written notice of an intended change in rates of pay, and to confer with designated representatives of the employees before changing rates of pay.

Specification of Errors

The Circuit Court of Appeals erred—

1. In holding that the suit filed to enforce an award of the National Railroad Adjustment Board was a suit upon a contract between the railroad labor organization representing employees and the carrier.

2. In holding that a collective bargaining agreement covering all employees of a craft or class regulating rates of pay, rules, or working conditions may be changed by a carrier signatory thereto without mandatory notice and conference prescribed by statute and that employees, at the instance of the carrier, may waive their rights through special individual agreements changing the whole structure as to rates of pay under threat of removing the agency from the stations.

3. In holding that acceptance of the reduced commission rates of pay by the employees at the instance of the carrier, deprived the authorized and designated representative

labor organization of the right to seek enforcement of an award sustaining the claims of the organization arising under its agreement.

4. In holding in disregard of the provisions of Section 6 of the Railway Labor Act of 1926, a carrier may, where the majority of a craft or class has selected a representative and a collective bargaining agreement has been promulgated, make with all such employees specific individual agreements altering rates of pay, without notice to or conference with the designated representatives of the employees.

5. In holding in disregard of the Railway Labor Act of 1926, the representative of the majority is not to represent the craft or class for the purposes of the Railway Labor Act, and that such Act does not reserve exclusively to craft representatives as opposed to individual employees the changing of collective agreements with respect to rates of pay, rules or working conditions affecting employees previously hired under the terms of such collective agreements.

6. In holding that the statute of limitations of the state of Georgia was a bar to an action on an award of the National Railroad Adjustment Board sustaining claims of the petitioning organization based upon continuing violations of a collective bargaining agreement.

7. In reversing the judgment of the District Court.

Summary Statement of the Matter Involved

Petitioner is a voluntary unincorporated association, national in scope, selected by crafts and classes of employees of carriers by railroad in accordance with the provisions of Section 2, of the Railway Labor Act. Respondent, a corporation, took over the express business on the Seaboard Air Line Railway upon dissolution of the American Railway Express

Company March 1, 1929. On that date the Railway Express Agency, Inc., in fact assumed, and operated under, the collective bargaining contract executed in 1917 between The Order of Railroad Telegraphers and the Southern Express Company regulating rates of pay, rules and working conditions governing the Southern Express Company's agents jointly employed as railroad and express agents, on the Seaboard Air Line Railway (R. 19-22).

The court below after referring to the evidence before the National Railroad Adjustment Board said: "We cannot say, when all of this evidence is considered, that the board's finding that the company in fact assumed, and operated under, the contract is without support in the evidence." (R. 375).

The Railway Labor Act of 1926, provided in Section 6, that carriers and representatives of the employees shall give at least thirty days' written notice of an intended change affecting rates of pay, rules or working conditions and shall agree upon the time and place of conference.

It was stipulated between the Telegraphers and the Express Agency that no notice of cancellation or any other notice was ever served on any of the General Chairmen of The Order of Railroad Telegraphers, hereafter referred to as Telegraphers, signatory to the Agreement of August 1, 1917 (R. 65).

The rules and rates of pay of the contract were applied by the Railway Express Agency, Inc., hereafter referred to as Express Agency, from March 1, 1929, to April 10, 1930. On March 25, 1930, the Express Agency, through one of its division superintendents, notified by letter each of the individual joint railroad-express agents under his supervision, that on and after April 10, 1930, the compensation which the Express Agency would pay for handling a carload shipment by express would be $5.00 per car instead of the per-

centage rate of agency commissions (R. 137). A similar notice was given by another division superintendent on April 8, 1930, to all joint railroad-express agents in his territory that the compensation of $5.00 per car would become effective with business on and after April 10, 1930 (R. 138).

The action of the Express Agency was protested by the Telegraphers through its Local Chairman in June, 1930 (R. 315). The Express Agency informed the Seaboard Air Line Railway Company shortly thereafter (R. 323) that it declined the claim made on behalf of Dinkins joint railway-express agent at Lawtey, Florida.

This claim and related claims remained unadjusted (R. 333). No voluntary board of adjustment having been agreed upon as provided in Section 3, of the Act of 1926, attempts to adjust the claims were renewed by the General Chairman (R. 324, 326, 327). Upon creation of the National Railroad Adjustment Board in 1934, efforts were made by the Telegraphers to secure the Express Agency's agreement to enter into a joint submission of the dispute to that Board. It was refused (R. 333).

Failing to adjust the dispute concerning the claims which arose as a result of altering the rates of pay, the matter was referred by the Telegraphers, representing the joint railroad-express agents, to the National Railroad Adjustment Board, Third Division.

In the hearings before the Adjustment Board, the Express Agency maintained:

1. That the members of the Telegraphers organization were not employees of the Express Agency and it was not their employer within the terms and provisions of the Railway Labor Act.*

*Express Agency's claim that the agents concerned were not in its employ was abandoned in the District Court (R. 57); (Court of Appeals' opinion (R. 373).

2. Even if the joint railroad-express agents were its employees, within the provisions of the Railway Labor Act, the Telegraphers had no contract with the Express Agency which would form the basis of a dispute under Section 153 (i) of the Railway Labor Act, as amended.

A deadlock having ensued among the members of the Third Division of the Adjustment Board over the question of jurisdiction, the National Mediation Board, upon request, appointed a neutral person as referee in order that the dispute could be again considered and a majority decision reached. Upon full consideration by the Third Division of the Adjustment Board, with a referee sitting as a member thereof, an award (R. 224-239) was rendered ordering that the case be heard on its merits.

Subsequently the Express Agency filed its response on the merits and further hearings were held before the Adjustment Board which again ended in a deadlock and the National Mediation Board was again requested to, and did appoint a neutral person other than the referee previously appointed to sit with the Adjustment Board as a member thereof to consider the dispute and endeavor to reach a majority decision. After oral argument before the referee by both parties to the dispute, the Third Division of the Adjustment Board rendered its award No. 548, (R. 7-16) for the enforcement of which this suit was filed under Section 153 (p) of the Railway Labor Act.

A Stipulation of Facts was entered into and filed in the District Court at the trial (R. 60-100, Exhibits 101-314). Following the opinion (R. 335-353), the District Court entered Findings of Fact and Conclusions of Law and Judg-

ment on the Award (R. 353-358).

On appeal to the Circuit Court of Appeals, that Court affirmed the District Court in the following particulars, and held:

1. The Third Division of the National Railroad Adjustment Board had jurisdiction of the dispute. (R. 374.)

2. The Express Agency in fact assumed, and operated under, the contract between the Telegraphers through its General Chairman and the Southern Express Company. (R. 375.)

The Court below, however, erroneously held that the suit filed by the Telegraphers was one on a contract and that the individual notices sent by the Express Agency to the 344 joint railroad-express agents, represented by the Telegraphers, constituted sufficient notice under the agreement and the acceptance of the altered rate of pay prevented the employees for themselves and the union for them, from any right of action to recover more. (R. 377).

As a basis for reversing the judgment of the District Court, the Court below misinterpreted the opinion of this Court in *Virginian Railway Co., v. System Federation No.* 40, 300 U. S. 515, 548-9, in holding that a carrier, subject to the Railway Labor Act, was permitted to make such individual contracts as it may elect to make directly with all of its employees, regardless of whether a collective agreement covering a craft or class was in existence, and that altering the rates of pay therein prescribed could be effected without the requisite statutory notice to and the resulting conferences with the designated representatives of the employees as provided in the Railway Labor Act.

Reasons for Granting the Writ

This case presents important new questions with respect to the construction of the Railway Labor Act of 1926, as amended June 21, 1934. The decision of the Court of Appeals below should be reviewed by this Court because:

1. It is a matter of public importance that the Railway Labor Act of 1926, should be properly and reasonably construed so that collective bargaining agreements in existence at the time of the passage of the Railway Labor Act may be maintained, and that no change in or alteration of the rates of pay, rules, or working conditions prescribed in such agreements may be effected without the performance of the mandatory duty imposed by the Act to confer with respect to the alteration of such agreements.

2. The decision of the Court of Appeals below is in conflict with the decision of this court in *Virginian Railway Co. v. System Federation No.* 40, 300 U.S. 548-9, in construing the Railway Labor Act as permitting individual contracts altering rates of pay prescribed in a collective bargaining agreement without notice to or conference with the designated representatives of the employees.

3. The decision of the Court of Appeals is in conflict with the decision of the Circuit Court of Appeals in the Seventh Circuit, in *National Labor Relations Board v. J. I. Case Company*, 134 F. (2d) 70, certiorari granted, 318 U.S. ..... in sustaining individual special agreements which were the fruits of an unfair labor practice, and is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Burke v. Morphy*, 109 F (2d) 572, certiorari denied, 310 U.S. 635, in approving methods employed repugnant to the Act, in altering rates of pay.

4. The decision of the Court of Appeals is contrary to and conflicts with the decisions of this Court in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway Clerks*, 281 U.S. 548; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1., *and National Licorice Company v. National Labor Relations Board*, 309 U.S. 350.

This Court has dealt with the distinct prohibition against coercive measures and reiterated its views on the necessities of labor organizations and that unions were essential to give laborers opportunity to deal on an equality with their employer.

5. The right of the Telegraphers and the public interest in the efficient operation of railroad and express transportation are seriously impaired by the decision of the Court of Appeals below.

6. This is the first occasion that there has been presented to this Court the question of the validity of special individual agreements altering rates of pay, prescribed in a collective bargaining agreement under the Railway Labor Act without notice to or conference with designated representatives of the employees, and should be decided by this Court.

The Court of Appeals has decided and we believe erroneously, questions of great public importance affecting and disturbing relations between carriers and their employees on all railroads subject to the Railway Labor Act and inevitably encouraging disputes between the standard railroad labor organizations and management, which should be avoided so far as possible particularly in the present time of war.

I

The Railway Labor Act Imposes A Legally Enforceable Obligation On Carriers To "Give At Least Thirty Days' Written Notice Of An Intended Change Affecting Rates Of Pay," And To Attempt To Agree Upon A "Time And Place For Conference Between The Representatives Of The Parties," Before Altering Rates Of Pay.

The main question involved is whether or not Section 6 of the Railway Labor Act of 1926, is to be construed in its application to the facts in this case, so as to permit a carrier to alter the rates of pay, rules, or working conditions of any of its employees, in effect at the time of the passage of the Act, without first giving at least thirty days' written notice to the representatives of the employees of an intended change affecting rates of pay, rules, or working conditions, in an effort to reach an agreement as to a time and place for conference between the representatives of the parties interested in such intended changes.

The primary purpose of the Railway Labor Act of 1926 was to protect commerce. The Act clearly manifests the intention of Congress to encourage, and in certain instances, to require collective bargaining between carriers and their employees, through designated representatives, as a means of effecting the settlement of disputes between carriers and their employees which might tend to interrupt the flow of commerce or the operation of a carrier engaged in interstate commerce.

Congress encouraged the *making* and *maintaining* of collective bargaining agreements concerning rates of pay, rules or working conditions between carriers and their employees (Section 2, First) through *representatives,* "designated by the respective parties in such manner as may be provided in their corporate organization, unincorporated association, or by

other means of *collective action,*" (Section 2, Third), and provided that "all disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, *in conference between representatives,* designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute." (Section 2, Second).

While all disputes between a carrier and its employees were required by Section 2, Second, to be considered, and, if possible, decided, with all expedition, in conference between representatives of the parties interested in the dispute, Section 2, Fourth, Fifth, and Section 6 of the Act outlined the particular mode of procedural processes to be complied with respecting attempted mediation of two specified classes of disputes. Section 2, Fourth, outlined the procedure to be complied with in disputes between a carrier and its employees "arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."

Section 2, Fifth, provided:

> "Disputes concerning changes in rates of pay, rules, or working conditions shall be dealt with as provided in Section 6 and in other provisions of this Act relating thereto."

Section 6 provided for notice to and an attempt to arrange a conference between representatives of the parties interested in an intended change, before any change should be made.

In each of these two specified classes of disputes, Congress imposed upon the designated representative or representatives of the carriers and of such employees, the duty to give notice and to attempt to agree upon (Section 6) or specify (Section 2, Fourth) a time and place for conference between the representatives of the parties interested in the dispute, so that the

dispute should be considered, and, if possible, decided, with all expedition, in conference between such representatives of the parties. (Section 2, Second). Congress specifically enacted a statutory prohibition against a carrier altering rates of pay, rules, or working conditions, in effect at the time of the passage of the Act, until after the representatives of the carrier and the representatives of the employees had exerted every reasonable effort to consider such disputes in conference. (Section 6.).

Would a notice sent under Section 6 of the Act of 1926 by representative of a carrier ("designated and authorized so to confer") to any person other than the representative of the employees, ("designated and authorized so to confer"), meet the requirements of the statute? The first duty placed upon the recipient of the notice is that he attempt to agree "within ten days after the receipt of the notice," upon "the time and place for conference between the representatives of the parties interested in such intended changes." Can it be said that the notice so provided was intended to be given to any person other than the representative so designated to confer? Can it be said that Congress intended the notice to be given to some individual employee and that such individual employee should have a duty to make an agreement with the representative of the carrier as to the time and place for conferences between the representative of the carrier and the representative of the employee? We do not think so. The notice obviously was to be sent to the representative of the employees who could reach an agreement as to the time and place of a conference between himself and the representative of the carrier. The provision of Section 2, Second, that *all* disputes be considered "with all expedition" in conference between representatives, precludes toleration of the delay which would arise upon notice not being sent directly to the repre-

sentative designated and authorized so to confer. The notice contemplated is a notice to the *representative* of the employees, and not otherwise. Whether the disputes in this case be considered as having arisen under Section 2, Fourth, or under Section 6, they were disputes under Section 2, Second, and were required to be "considered, . . . with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier and the employees thereof interested in the dispute."

Congress froze the rates of pay, rules and working conditions which were in effect between carriers and their employees by the provisions of Section 6, and provided further that such frozen "rates of pay, rules and working conditions shall not be altered by the carrier . . . unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Board of Mediation."

Aside from the provisions of Section 6, there was provided certain subsequent procedure, mandatory in character, which indicates the extent to which Congress has gone to safeguard railroad employees against summary and arbitrary alterations of rates of pay, rules or working conditions prescribed in their collective agreements with carriers. As outlined in the foregoing section, following the giving of notice, the Act requires holding of conferences between the parties. Where such conferences are unsuccessful, either party may invoke the services of the Board of Mediation, or the Board may proffer its services. (Section 5, First, Act of 1926.) That section places the duty of the Board of Mediation "as its final required action," if its efforts to bring about a settlement through mediation have been unsuccessful, to induce the parties to submit to arbitration. In the event that the dispute be not adjusted under the foregoing provisions of the Act, and

an emergency Board is created under Section 10, for thirty days thereafter, no change shall be made by the parties to the controversy in the conditions out of which the dispute arose.

It is undisputed that no notice as provided in Section 6 was given to the authorized representatives of the employees of intention to alter the rates of pay provided in the collective agreement. The record is devoid of showing that Section 6 was complied with, and there was no contention either in the Express Agency's pleading or argument to the court that the duty of giving notice under Section 6 of the Act was complied with. The District Court in the opinion held (R. 351) "The notice was not in compliance with the terms of the Railway Labor Act of 1926 in effect at that time." The District Court, in its additional findings of fact, (R. 356) found: "(7) No notice was given by the agency to the representatives of the joint agents of the carrier's intention to change the terms of the agreement of August 1, 1917, as provided in Article 14 of the agreement, nor was any notice given in compliance with the terms of Section 6 of the Railway Labor Act of 1926, in effect at that time."

This finding, that the notice of the change of rates of pay was not in accordance with the terms of Section 6 of the Act of 1926, was not excepted to and was not specified in the statement of points to be relied upon on appeal. (R.360-363).

It cannot be successfully denied that the Express Agency was attempting to change a collective agreement embodying a whole class into a large number of individual contracts embodying all the members of that class. The individual contracts between a carrier and its employees, made in the manner which the Express Agency attempted to use in this case, are not the types of individual contracts which were approved in the case of *Virginian Ry. Co. v. System Federa-*

tion No. 40, etc., 300 U. S. 515.

It would appear that the language employed in Section 2, Fifth, and Section 6, of the Act of 1926, would furnish no means of escape from the conclusion that the duties required by the sections are mandatory and that no change affecting rates of pay can be validly accomplished without giving the thirty days' notice and following subsequent procedural processes.

The commands and prohibitions of these sections are clear and positive. The use of the word "shall" indicates that the direction is mandatory. It is the language of command, not advice. (Escoe v. Zerbst, 295 U. S. 490, 493.) When the purposes of the act are considered, there can be no doubt that the requirements of the Act for the giving of notice, etc., are mandatory upon the carrier employer. (*Virginian Ry. Co. v. System Federation No. 40*, 300 *U. S.* 515, 542-545.) Were the requirements of the Act advisory, the procedure herein outlined, which is designed to facilitate voluntary adjustment of disputes by requiring the *status quo* to be maintained after the giving of notice and until at least thirty days after Mediation has failed or the Emergency Board has made its report, would be useless.

The Act, as amended June 21, 1934, strengthened the making and maintaining of agreements and prohibited arbitrarily altering rates of pay prescribed in agreements by the addition of Section 2, Tenth, providing that a willful failure or refusal of a carrier, its officers or agents to comply with the terms of Section 2, Seventh, is a misdemeanor and punishable by fine or imprisonment, or both. The provisions of Section 2, Seventh, may be compared to Section 2, Fifth, of the Act of 1926.

The Act, as it stood in 1926 when first enacted, imposed definite and enforcible obligations notwithstanding the

absence of statutory penalties. (*Texas & N. O. R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 567, 569.) Criminal sanctions were plainly not necessary to the enforcement of the provisions of the Act, they were added by the amendment of 1934, (Section 2, Tenth,), to prevent a carrier from changing rates of pay, prescribed in a collective agreement or in Section 6 of the Act.

An effort on the part of a carrier to change rates of pay, etc., without giving the thirty days' notice required by Section 6 was enjoined in *Railway Employees Coop. Assn. v. Atlanta B. & C. R. R. Co.* (D. C. Ga. 1938) 22 F. Supp. 510, where the prohibitory and mandatory effect of Section 6 was recognized.

In a case arising under the Newlands Act (Public No. 6, (63d Congress) approved July 15, 1913), a prohibition similar in effect was enforced. Section 9 of that Act provided that whenever receivers appointed by a Federal Court were in possession of a railroad "no reduction of wages shall be made by such receivers without the authority of the court therefor, after notice to such employees, said notice to be given not less than twenty days before the hearing upon the receivers' petition or application.* * *" In *Birmingham Tr. & Sav. Co. v. Atlanta, B. & A. Ry. Co.* (D.C.N.D. of Ga. 1931) 271 Fed. 731, an order of the court authorizing a reduction of wages without the delay of twenty days was held to be without legal effect. The court upheld the validity of the Act in that case.

The Railway Labor Act of 1926 applied to the facts in this case was and is controlling as to the issues involved. The District Judge so construed and applied the Act. In his opinion (R. 351) the District Judge held as to the notice relied upon by the Express Agency:

"This notice was not in compliance with the terms of the Railway Labor Act of 1926, in effect at that time. It purported to be effective immediately, thus not giving the required thirty days' notice and failed to give the time and place for conferences between the representatives of the parties interested in such intended changes. It was, therefore, impossible to provide the time for conferences provided by the Act.

"Thus without regard to the question as to whether the notice should have been served upon the bargaining representative or the employees, the notice failed to comply with this important provision of the statute and could well be disregarded by the employees. This action by the carrier, as well as the negotiation of the individual agreements, doubtless resulted from the position of the carrier that it was not bound by the 1917 agreement, and its further position, now abandoned, that no employer-employee relationship existed between it and the joint agents. These questions having been determined adversely to the carrier's contention, the means then employed to obtain relief from what it deemed to be burdensome terms of employment, are rendered ineffectual, and the defendant carrier is obliged to comply with the terms of the award as sought to be enforced in this proceeding."

The conclusion of the District Judge that "It was, therefore, impossible to provide the time for conferences provided by the Act," is correct. There is no question as to the dispute having been one "concerning intended changes in rates of pay."

A

The Circuit Court of Appeals erred in holding that the written notice given to every joint agent, and the securing of the consent to the arrangement of each agent affected, was all that was required to alter the rates of pay prescribed in the agreement of August 1, 1917.

The notices required by Section 2, Fourth, and by Section 6 of the Railway Labor Act of 1926 were notices intended to pave the way "for conferences between representatives." While Section 2, Second, did not set up a particular form of notice, it required all disputes to be considered in conference between representatives designated and authorized so to confer, and placed a duty upon the representatives of the carrier and of the employees to arrange a conference between them at which the dispute could be so considered. These provisions superseded the provisions of Article 14 of the Agreement permitting ex-parte or unilateral abrogation of the Agreement without conference between the representatives of the parties.

That this was the clear intention of Congress is evidenced by the third proviso of Section 2, Fourth, "That nothing in this paragraph shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties." The Act was intended to invoke the aid of conferences where there was no provision for them in existing agreements. The notices required by the statute were for the purpose of setting in motion the collective bargaining machinery. Representatives were given ten days from the receipt of the notice within which to specify (Section 2, Fourth) or agree upon (Section 6) a time and place for conference between representatives.

The holding of the Court below that "the securing of the consent to the arrangement of each agent affected" (regardless of how obtained) was sufficient to support the change of rates of pay provided in the agreement, disregards the provisions of Section 6 requiring thirty days' notice and an effort to arrange conferences between the representatives of the parties interested in such intended changes, as a condition precedent to the right of the carrier to alter the rates of pay prescribed in the agreement.

An individual employee could not agree to the abrogation of the agreement affecting the whole class of employees covered by the agreement. So long as the agreement was in force and effect, any intended changes therein, whether affecting the whole class or an individual employee, were prohibited by the Act, unless changed in compliance with the provisions of Section 6.

This Court in construing the Railway Labor Act of 1926 in *Texas & N. O. Railroad Co. v. Brotherhood of Railway & S. S. Clerks*, 281 U. S. 548, upheld the constitutionality of the Act, and said on page 568 of the opinion:

> "A definite statutory prohibition of conduct which would thwart the declared purpose of the statute cannot be disregarded."

The *Clerks'* case, supra, dealt with the distinct prohibition against coercive measures, at pp. 567 and 568 of the opinion.

The Court reasserted what it said in the *Clerks'* case, in sustaining the application of the Railway Labor Act of 1934, in the case of *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515.

In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, this Court reiterated its view of the necessity of labor organizations as essential to give laborers opportunity to deal on an equality with their employer because a single employee was helpless in dealing with an employer.

B

The threats to remove the agency unless the individual employee accepted a lower rate than provided in the agreement is tantamount to an interference with the employee's representation by the Telegraphers.

The wholesale change in rates of pay was effected as a result of an agreement reached with Dinkins, the joint railway-express agent, at Lawtey, Florida, November 29, 1929, "with the understanding the practice will be general on the Seaboard Air Line." (R. 88).

The Express Agency, in order to secure the possible advantage of Dinkins' conditional agreement to accept $5.00 per car on car lot shipments, had to comply with the condition prescribed by Dinkins by making "the practice general on the Seaboard Air Line.". It therefore sent out the notices of March 25, 1930, and April 8, 1930, for the purpose of making the rate of $5.00 per car general on the Seaboard Air Line effective April 10, 1930.

As to the consent to the arrangement on the part of joint railway-express agents, Smith and Meares, and which was typical of the consent of other agents whose claims were denied by the Court below, the record shows:

Paul Smith, Emory, Georgia (R. 78-81)

On April 29, 1930, joint agent Smith wrote Superintendent May that it would "be necessary for him to take the regular commissions on car load shipments as there are no provisions being made on such shipments in the contract." The Agency sent agent Smith "error letters" charging him with the difference because Smith continued to deduct "the usual percentage rate of agency commissions." The company ended Smith's employment on August 7, 1931, and set up the express agent successor to Smith, at a location other than the Seaboard Air Line Railway station. On October 5, 1931, Smith meekly capitulated to the dictation of the Express Agency and agreed to accept $5.00 per car and was promptly checked in again as agent at Emory for the Express Agency.

E. Meares, McBee, S. C. (R-98-99)

The letter of joint agent Meares to Harrison, route agent for the Express Agency, dated June 16, 1930, (R-378), clearly reveals that the company had threatened to separate him from his agency, as it had done Smith at Emory. So Meares, in succumbing to the interference, influence and coercion on the part of the express Agency's representative, Mr. Harrison, agreed to refrain from handling the matter with the general Chairman and to accept the $5.00 per car rate. He was thus interfered with, influenced and coerced, in his designation of a representative by the carrier, in violation of Section 2, Third, of the Railway Labor Act.

The viciousness of the scheme adopted is that it deprives the employees of the right which experience shows it advisable for them to have, and which Congress has unequivocally declared they shall have, namely the right to bargain with management and accordingly have a voice and authority, through authorized representatives, in determining what the rights of the employees shall be.

The inescapable result of the action of the Express Agency is that if it may validly adopt this method of altering rates of pay, other carriers may pursue a similar policy with the same showing of justification. The inevitable outcome will be economic warfare caused by evading the procedural processes Congress has mandated shall be followed to avoid such strife.

The duty of the Express Agency to *maintain* agreements with its employees prescribed by the Act of 1926, obviously includes the duty to refrain from using tactics expressly condemned by the Act for the purpose of breaking down an existing agreement.

The provisions of the Act requiring good faith in the *making* of collective agreements is useless if, after such agreements

are made, the carrier can employ the sabotage tactics of interference, influence and coercion of helpless individual employees to destroy the structure which was erected in good faith. The Act compels the same good faith in the *changing* of collective bargaining agreements as it requires in their making.

Can it be that a carrier, like the Express Agency is by statute required to specify a time and place to confer with the representative of its employees where they have a grievance, (Section 2, Fourth) but is not under a legal obligation to attempt to agree upon (Section 6) a time and place for conference with representatives of its employees when it wishes to change the rates of pay and working conditions of its employees?

The question presented to this Court in this case is an important Federal question of great public interest involving the whole fabric of collective bargaining legislation and should be decided by this Court.

The right of the carrier and employee to enter into such contract as they please at the time of the original hiring is not impaired by the statute. But such right is exhausted when the hiring takes place without a specific agreement that the terms of employment are made upon some basis different from the basis provided in the collective agreement. In the absence of such specific agreement, the hiring is presumed to be upon the terms of the collective agreement, and may not be changed except after notice and conferences between the representatives of the carrier and employees signatory to the collective agreement. The provision of the Act requiring collective agreements not to be altered until after notice and conference between representatives designated and authorized so to confer, is not a restriction of the right of a carrier to make any contract it pleases when hiring new employees.

C.

The decision of the Circuit Court of Appeals is in conflict with decisions of other circuits and decisions of this Court.

The decision of the Circuit Court of Appeals in this case is directly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Burke v. Morphy*, 109 F. (2d) 572, certiorari denied, 310 U. S. 635.

In *Burke v. Morphy*, supra, this Court refused to review the decision of the Circuit Court of Appeals which set aside a wage cut order of a District Judge ordering the receiver of a railroad carrier to cut wages of the railroad's employees because the receiver had no money to pay the wages fixed in the collective bargaining agreements, and holding that such order was without legal justification because the Railway Labor Act "forbids any intended change in an agreement affecting rates of pay unless thirty days' notice is given to the other party to the agreement." Pay checks given employees in that case contained an endorsement purporting to constitute an acknowledgment of full payment for services up to and including the date of the draft. In this case the Telegraphers organization as representing the joint railway-express agents was well within its rights in its position that the Express Agency was violating the Railway Labor Act in making the changes with respect to rates of pay. Since the act of the Express Agency contravened the plain prohibition of the Act it was a nullity, and until the rates of pay, or the agreement affecting rates of pay were changed in accordance with the provisions of the Act, the joint railway-express agents, employees of the Express Agency, were entitled to their pay under the terms of the agreement as it existed March and April, 1930. This would be true even without a protest on the part of the employees, but by making the protest shortly

thereafter the employees made doubly sure that they were not accepting any part of the Express Agency's arbitrary alteration.

In *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 366, this Court in referring to the *Virginian* case said:

> "The effect of the decree was to order the employer to deal exclusively with the Federation, although the employee had a contract with an association not a party to the suit found to be a dominated labor organization . . . . But in all, the public right was vindicated by restraining the unlawful actions of the defendant even though the restraint prevented its performance of the contracts."

The court below declined to follow the ruling of this Court in the *National Licorice* case, supra, (R. 376) in that it construed this suit for an order to enforce the award of the National Railroad Adjustment Board as a suit upon a contract and not dealing with the assertion of public rights. This ruling by the court below is directly in conflict with the contrary ruling in the case of *Washington Terminal Co. v. Boswell*, 124 F. (2d) 235, 242, decided by the United States Court of Appeals for the District of Columbia; affirmed by this Court by a divided Court, June 14, 1943, 318 U. S. ____, where the Court of Appeals held that the National Railroad Adjustment Board is a "Public agency", performing public functions, and therefore its decisions are not without legal effect.

The decision of the court below is in conflict with the decisions of this court in *Texas & N. O. R. Co. v Brotherhood of Railway Clerks*, 281 U. S. 548; *National Labor Relations Board v. Jones & Laughlin Steel Corp.* 301 U. S. 1; *Virginian Railway Co. v. System Federation* No. 40, 300 U. S. 515; and

with the decision of the Circuit Court of Appeals for the Seventh Circuit in *National Labor Relations Board vs. J. I. Case Co.* 134 F. (2d) 70.

II

A State Statute of Limitations Is No Bar To A Suit Upon An Award of The National Railroad Adjustment Board.

The court below has intimated that if it is in error as to the Telegraphers right to recover, it is in no doubt that the bar of the statute has fallen as to the amounts sued for which accrued more than six years before the suit was filed. This ruling of the court is clearly erroneous for the reason that the suit is brought to enforce an award and order of the National Railroad Adjustment Board, and the cause of action accrued under the provisions of Sec. 153(p) of the Railway Labor Act, as amended. The only statutory limitation upon a suit brought for the enforcement of such an award is prescribed as two years under the provisions of Section 153(q) of the Act. This suit was brought within that time, and the award is enforceable in all of its terms under the provisions of the Act as interpreted by the Court of Appeals for the District of Columbia in *Washington Terminal Co. v. Boswell*, supra.

To permit the decision of the Court below to stand will pave the way for a wholesale evasion of the Act by a substantial portion of the railroads and other industries subject to related legislation.

An amendment was offered by the Chairman of the Committee of Railroads delegated to deal with the amendments to the Act of 1926, at the time such amendments were considered by the respective committees of the Senate and House of Representatives in S. 3266 and H. R. 7650. Mr. M. W. Clement, the above chairman, proposed among other amend-

'ments the following:

> "Provided, that no board created under the provisions of this section shall consider a grievance of any character the cause of which arose more than 2 years prior to the effective date of this Act." (Senate Hrgs. - S. 3266, p. 71; House of Rep. Hrgs. H. 7650, p. 137).

The proposed amendment was not adopted.

Mr. Joseph B. Eastman, testifying before the Senate Committee on Interstate and Foreign Commerce (S. 3266, p. 17, April 10, 1934), said:

> "Because of the lack of adjustment boards in many situations and the tendency of those which do exist to deadlock, very disturbing conditions have at times been created especially in recent months, in at least four important instances, strike votes have been taken for the purpose of creating an emergency which would justify the President in appointing a fact-finding board, so that these grievances and similar controversies might be passed upon by an impartial body."

Similar testimony was presented by Mr. George M. Harrison, on behalf of the standard railway labor unions. See Hearing on H. R. 7650, pp. 80-82.

Public Importance of the Issues

The issues here involved are of grave public importance. This Court will take judicial notice of the following matters of common knowledge:

> 1. That railroad and express transportation is of vital importance to the entire nation and is a critical necessity;
>
> 2. That efficient transportation depends in considerable measure upon the exercise of every reasonable effort to maintain agreements and satisfactory and harmonious relations between management and labor;

3. That employees of carriers subject to the Railway Labor Act are almost completely organized in brotherhoods and organizations, national in scope, whose jurisdictions and authorized representation have long been upheld.

4. That employees will no longer comply with terms imposed by the statute to make agreements which would avail them nothing in the face of the constant activities of the carriers seeking individual agreements with employees to gain the advantages which they were unable to gain in negotiations with representatives of the employees. This will obviously mean a return to the old system of strikes and lockouts resulting in continuous and nation-wide interruptions of the free flow of interstate commerce.

Conclusion

The Petition for Certiorari should be granted in order that this Court may review the decision of the United States Circuit Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

WILLIAM G. MCRAE,
LEO J. HASSENAUER,

Attorneys for
The Order of Railroad Telegraphers,
Petitioner.

A

Section 153, (i), (p), & (q) of the Railway Labor Act as amended, June 21, 1934:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the

court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

NO. 343

THE ORDER OF RAILROAD TELEGRAPHERS,
Petitioner,

VS.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

BRIEF FOR PETITIONER, THE ORDER OF RAILROAD TELEGRAPHERS.

WILLIAM G. McRAE,
First National Bank Bldg.,
Atlanta, Georgia,

LEO J. HASSENAUER,
105 W. Adams St.,
Chicago, Ill.
Counsel for Petitioner.

November 4, 1943.

THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

NO. 343

THE ORDER OF RAILROAD TELEGRAPHERS,
Petitioner,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

BRIEF FOR PETITIONER, THE ORDER OF RAILROAD TELEGRAPHERS.

Opinion Below.

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, is reported at 137 F. (2d) 46, and is printed in the record at R. 369-377. The opinion of the District Court, Findings of Fact and Conclusions of Law is printed in the record at R. 335-356.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals, Fifth Circuit, sought to be reviewed was entered on July 9, 1943, (R. 378). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28 U. S. C. 347, 43 Stat. 938).

Statute Involved.

The suit was brought by The Order of Railroad Telegraphers to enforce an award rendered by the National Railroad Adjustment Board. Such suit was filed in the District Court of the United States for the Northern District of Georgia, under Section 153(p) of the Railway Labor Act, as amended, (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. 151 et seq.).* Certain provisions of the Railway Labor Act of 1926, c. 347, 44 Stat. 577; U. S. C. Tit. 45, Secs. 151-163, are involved because the change in rates of pay was effected in 1930, in violation of the provisions of Section 6 and related provisions of the Act of 1926.

The portion of the Act of 1926 principally concerned is Section 6, which provides in part as follows:

> Procedure in Changing Rates of Pay, Rules and Working Conditions.
>
> "Sec. 6. Carriers and the representatives of the employees shall give at least thirty days' written notice of an intended change affecting rates of pay, rules, or working conditions, and the time and place for conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. * * * In every case where such notice of intended change has been given or conferences are being held with reference thereto, or the services of the Board of Mediation have been requested by either party, or said board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the Carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Board of Mediation, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Board of Mediation."

*Section 153 (i), (p), and (q) appear in Appendix B hereto.

In addition the General Duties prescribed in the Act of 1926, are similarly involved:

"Sec. 2. First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.

Fourth. In case of a dispute between a carrier and its employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the railroad line of the carrier involved unless otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to

reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further*, That nothing in this paragraph shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Fifth. Disputes concerning changes in rates of pay, rules, or working conditions shall be dealt with as provided in section 6 and in other provisions of this Act relating thereto."

The sanctions of the criminal as well as the civil law have by Section 2, Tenth, of the Act of June 21, 1934, been made applicable, to changes, without thirty days' notice in the rates of pay, rules, or working conditions of classes of employees (Section 2, Seventh) (Section 2, Fifth of the Act of 1926), to interferences with labor organizations of employees, (Section 2, Fourth) to coercive attempts to induce employees to join or not to join a labor organization (Section 2, Fourth and Fifth) and to interferences with the designation of representatives (Section 2, Third).

Questions Presented.

1. Whether or not Section 6 of the Railway Labor Act of 1926 is to be construed, in its application to the facts of this case, so as to permit a carrier to alter rates of pay, rules, or working conditions of any of its employees, in effect at the time of the passage of the Act, without first giving at least thirty days' written notice to the authorized and designated representatives of the employees of an intended change affecting rates of pay, rules or working conditions, in an effort to reach an agreement as to a time and place for conference between the representatives of the parties interested in such intended changes.

2. Whether or not, where a majority of a craft or class has selected a representative, signatory to an agreement, a carrier is free to make with any one it pleases and for any group it pleases, contracts altering established rates of pay, rules, or working conditions, without notice to or conferences with the designated representatives of the employees involved.

3. Whether or not Section 6 and Section 2, Second and Fourth of the Act of 1926, manifest an intent on the part of Congress that carriers shall confer with representatives of the employees before changing rates of pay, rules or working conditions.

4. Whether or not the conclusion of the court below, to the effect that a group of employees affected accepted compensation, not in the terms provided in the agreement, but upon those fixed by the carrier, deprived the representative organization of a right of action in a suit upon an award under Section 153(p) of the Act, as amended.

5. Whether or not the conclusion of the court below that the bar of the state statute of limitations has fallen as to all of the amounts due under the terms of the award which accrued more than six years before suit was filed, ousts the jurisdiction of the United States District Court in a suit for an order to enforce an award brought within the statutory period as provided in Section 153(q) of the Act, as amended.

6. Whether or not the Railway Labor Act of 1926 is to be construed, in its application to the facts of this case, so as to permit any alteration by a carrier of rates of pay, rules, or working conditions, in effect at the time of the passage of the Act, without the carrier exerting every reasonable effort to comply with the requirements of the Act prescribing a brief period of attempted mediation with the

representatives of its employees designated so to confer in the manner provided by the Act.

7. Whether or not the Railway Labor Act of 1926, imposes a legally enforceable obligation on carriers to give thirty days' written notice of an intended change in rates of pay, and to confer with designated representatives of the employees before changing rates of pay.

Statement.

Petitioner is a voluntary unincorporated association, national in scope, selected by crafts and classes of employees of carriers by railroad in accordance with the provisions of Section 2, of the Railway Labor Act. Respondent, a corporation, took over the express business on the Seaboard Air Line Railway upon dissolution of the American Railway Express Company March 1, 1929. On that date the Railway Express Agency, Inc., in fact assumed, and operated under, the collective bargaining contract executed in 1917 between The Order of Railroad Telegraphers, hereinafter referred to as Telegraphers, and the Southern Express Company regulating rates of pay, rules and working conditions governing the Southern Express Company's agents jointly employed as railroad and express agents, on the Seaboard Air Line Railway (R. 19-22).

The rules and rates of pay of the contract were applied by the Railway Express Agency, Inc., hereafter referred to as Express Agency, from March 1, 1929, to April 10, 1930. On March 25, 1930, the Express Agency through one of its division superintendents, notified by letter each of the individual joint railroad-express agents under his supervision, that on and after April 10, 1930, the compensation which the Express Agency would pay for handling a car-

load shipment by express would be $5.00 per car instead of the percentage rate of agency commission (R. 137). A similar notice was given by another division superintendent on April 8, 1930, to all joint railroad-express agents in his territory that the compensation of $5.00 per car would become effective with business on and after April 10, 1930 (R. 138).

The Railway Labor Act of 1926, provided in Section 6, that carriers and representatives of the employees shall give at least thirty days' written notice of an intended change affecting rates of pay, rules or working conditions and shall agree upon the time and place of conference.

It was stipulated between the Telegraphers and the Express Agency that no notice of cancellation or any other notice was ever served on any of the General Chairmen of the Telegraphers, signatory to the Agreement of August 1, 1917 (R. 65).

The action of the Express Agency was protested by the Telegraphers through its Local Chairman in June, 1930 (R. 315). The Express Agency informed the Seaboard Air Line Railway Company shortly thereafter (R. 323) that it declined the claim made on behalf of Dinkins joint railway-express agent at Lawtey, Florida.

This claim and related claims remained unadjusted (R. 333). No voluntary board of adjustment having been agreed upon as provided in Section 3, of the Act of 1926, attempts to adjust the claims were renewed by the General Chairman (R. 324, 326, 327). Upon creation of the National Railroad Adjustment Board in 1934, efforts were made by the Telegraphers to secure the Express Agency's agreement to enter into a joint submission of the dispute to that board. It was refused (R. 333).

Failing to adjust the dispute concerning the claims which arose as a result of altering the rates of pay, the matter was referred by the Telegraphers, representing the joint railroad-express agents, to the National Railroad Adjustment Board, Third Division.

In the hearings before the Adjustment Board, the Express Agency maintained:

1. That the members of the Telegraphers organization were not employees of the Express Agency and it was not their employer within the terms and provisions of the Railway Labor Act.*

2. Even if the joint railroad-express agents were its employees, within the provisions of the Railway Labor Act, the Telegraphers had no contract with the Express Agency which would form the basis of a dispute under Section 153(i) of the Railway Labor Act, as amended.

A deadlock having ensued among the members of the Third Division of the Adjustment Board over the question of jurisdiction, the National Mediation Board, upon request, appointed a neutral person as referee in order that the dispute could be again considered and a majority decision reached. Upon full consideration by the Third Division of the Adjustment Board, with a referee sitting as a member thereof, an award (R. 224-239) was rendered ordering that the case be heard on its merits.

Subsequently the Express Agency filed its response on the merits and further hearings were held before the Adjustment Board which again ended in a deadlock and the National Mediation Board was again requested to, and did appoint a neutral person other than the referee previously

*Express Agency's claim that the agents concerned were not in its employ was abandoned in the District Court (R. 57); (Court of Appeals' opinion (R. 373).

appointed to sit with the Adjustment Board as a member thereof to consider the dispute and endeavor to reach a majority decision. After oral argument before the referee by both parties to the dispute, the Third Division of the Adjustment Board rendered its award No. 548, (R. 7-16) for the enforcement of which this suit was filed under Section 153(p) of the Railway Labor Act.

A Stipulation of Facts was entered into and filed in the District Court at the trial (R. 60-100, Exhibits 101-134). Following the opinion (R. 335-353), the District Court entered Findings of Fact, and Conclusions of Law and Judgment on the Award (R. 353-358).

On appeal to the Circuit Court of Appeals, that Court affirmed the District Court in the following particulars, and held:

1. The Third Division of the National Railroad Adjustment Board had jurisdiction of the dispute (R. 373).

2. The Express Agency in fact assumed, and operated under, the contract between the Telegraphers through its General Chairman and the Southern Express Company (R. 374).

The Court below, however, erroneously held that the suit filed by the Telegraphers was one on a contract and that the individual notices sent by the Express Agency to the 344 joint railroad-express agents, represented by the Telegraphers, constituted sufficient notice under the agreement and the acceptance of the altered rate of pay prevented the employees for themselves and the union for them, from any right of action to recover more (R. 376).

As a basis for reversing the judgment of the District Court, the Court below (R. 375) misinterpreted the opinion of this Court in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 548-9, in holding that a carrier,

subject to the Railway Labor Act, was permitted to make such individual contracts as it may elect to make directly with all of its employees, regardless of whether a collective agreement covering a craft or class was in existence, and that altering the rates of pay therein prescribed could be affected without the requisite statutory notice to, and the resulting conferences with, the designated representatives of the employees as were made mandatory in the Railway Labor Act.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred—

1. In holding that the suit filed to enforce an award of the National Railroad Adjustment Board was a suit upon a contract between the railroad labor organization representing employees and the carrier.

2. In holding that a collective bargaining agreement covering all employees of a craft or class regulating rates of pay, rules, or working conditions may be changed by a carrier signatory thereto without mandatory notice and conference prescribed by statute and that employees, at the instance of the carrier, may waive their rights through special individual agreements changing the whole structure as to rates of pay under threat of removing the agency from the stations.

3. In holding that acceptance of the reduced commission rates of pay by the employees at the instance of the carrier, deprived the authorized and designated representative labor organization of the right to seek enforcement of an award sustaining the claims of the organization arising under its agreement.

4. In holding in disregard of the provisions of Section 6 of the Railway Labor Act of 1926, a carrier may, where

the majority of a craft or class has selected a representative and a collective bargaining agreement has been promulgated, make with all such employees specific individual agreements altering rates of pay, without notice to or conference with the designated representatives of the employees.

5. In holding in disregard of the Railway Labor Act of 1926, the representative of the majority is not to represent the craft or class for the purposes of the Railway Labor Act, and that such Act does not reserve exclusively to craft representatives as opposed to individual employees the changing of collective agreements with respect to rates of pay, rules or working conditions affecting employees previously hired under the terms of such collective agreements.

6. In holding that the statute of limitations of the state of Georgia was a bar to an action on an award of the National Railroad Adjustment Board sustaining claims of the petitioning organization based upon continuing violations of a collective bargaining agreement.

7. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT.

The decision of the Court of Appeals below should be reversed by this Court because:

I. In the Railway Labor Act of 1926, Section 6, Congress imposed a legally enforceable obligation on carriers to give at least thirty days' written notice of an intended change affecting rates of pay, rules, or working conditions, and to agree upon a time and place for conferences between representatives of the parties interested in such intended changes before altering rates of pay. Congress in the same Act, Section 2, Fifth, provided that disputes concerning

changes in rates of pay, rules, or working conditions, shall be dealt with as provided in Section 6 and in other provisions of the Act relating thereto. The Court below in the instant case, gave no consideration to the mandatory provisions of these Sections and decided the question independently. The District Court found as a fact that no notice was given by the Express Agency in compliance with Section 6 of the Act of 1926. The Express Agency did not take issue with this finding upon its appeal to the court below. It had stipulated that no official notice of cancellation of the Express Schedule Agreement of August 1, 1917, was ever served on any of the General Chairmen of the Telegraphers.

The Court below having concurred in the finding of the Adjustment Board and of the District Court that the Express Agency in fact assumed, and operated under, the contract of August 1, 1917, was bound to apply the mandatory provisions of Section 6 and to hold in accordance with the findings of the District Court that no notice was given in compliance with the terms of said Section.

Under the decisions of this Court, upon consideration of the purposes of the Act, there can be no doubt that the requirements of the Act for the giving of notice, etc., are mandatory upon the carrier employer. *Virginian Railway Company* v. *System Federation No. 40*, 300 U. S. 515, 542-545.

Notices sent individual employees, covered by a collective bargaining agreement, of a change in rates of pay, effective from two to sixteen days, without providing for the full period of consideration of the carrier's proposal, deprived employees of communicating with each other and their duly authorized representatives in an effort to secure conferences on the proposal of a change in rates of pay. The "Take It or Leave It" policy of the Express Agency

is violative of every principle of collective bargaining. The securing of the consent of employees affected by the method pursued by the Express Agency cannot by any stretch of the imagination be termed a compliance with the principles of the Railway Labor Act, or with the provisions in a collective bargaining agreement requiring thirty days' notice of cancellation.

II. The lower court concurred in the findings of the District Court and of the National Railroad Adjustment Board, that

1. The Third Division of the National Railroad Adjustment Board had jurisdiction of the dispute.

2. The Express Agency in fact assumed, and operated under, the contract between the Telegraphers through its General Chairman and the Southern Express Company.

Thus, since the two lower courts "reached the same conclusion on a question of fact, their finding will not be disturbed unless clear error is shown." *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 558; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 542-545; *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, 4.

Congress having left these matters to the determination of an administrative body, the function of review is performed by the courts when they determine that there has been a fair hearing, and an application of the statute in a just and reasoned manner. *Gray* v. *Powell*, 314 U. S. 402, 411-413; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 180-181.

III. There is no merit in respondent's argument that (a) it had the absolute right to make individual contracts and that this Court in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, conferred the right of individual agreement, and (b) that there was nothing in the Railway Labor Act which would outlaw such individual

agreement even though a collective bargaining agreement was in effect. Respondent's argument entirely misconceives the meaning of this Court's opinion in the *Virginian* case and of this Court's opinion in *Texas & N. O. R. Co.* v. *Brotherhood of Railway and S. S. Clerks*, 281 U. S. 548. The decisions upholding the General Duties, as set forth in Section 2 of the Act and prohibiting interference and outlawing various methods of engaging in it are plainly controlling here.

Respondent's argument assumes that because of the mandatory provisions of Section 2, Fifth, and Section 6 of the original Railway Labor Act of 1926, its liberty of contract is limited. The premise of the argument is that liberty of contract is absolute and not subject to restriction in the public interest.

This Court has repeatedly held that the due process clause confers no such immunity.

IV. Where a collective bargaining agreement has been promulgated between an employer and authorized representatives of the employees and which agreement has never been abrogated by either of the parties, no changes may be made of the rates of pay, rules or working conditions by employees acting individually. Such action is prohibited in the declared policy of the Railway Labor Act and is further violative of the public policy that union is essential to give employees opportunity to deal on an equality with the employer. *National Labor Relations Board* v. *Jones & Laughlin*, 301 U. S. 1, 33-34.

The prohibitions of Section 6 and Section 2, Seventh, of the Railway Labor Act against changes in rates of pay or working conditions are aimed at preventing changes fixed in collective bargaining agreements previously promulgated and published by the employer. *Williams* v. *Terminal Co.*, 315 U. S. 386, 399, 400, 402-3.

ARGUMENT.

I.

The Railway Labor Act imposes a legally enforceable obligation on carriers to "give at least thirty days' written notice of an intended change affecting rates of pay," and to attempt to agree upon a "time and place for conference between the representatives of the parties," before altering rates of pay.

The main question involved is whether or not Section 6 of the Railway Labor Act of 1926, is to be construed in its application to the facts in this case, so as to permit a carrier to alter the rates of pay, rules, or working conditions of any of its employees, in effect at the time of the passage of the Act, without first giving at least thirty days' written notice to the representatives of the employees of an intended change affecting rates of pay, rules, or working conditions, in an effort to reach an agreement as to a time and place for conference between the representatives of the parties interested in such intended changes.

The primary purpose of the Railway Labor Act of 1926 was to protect commerce. The Act clearly manifests the intention of Congress to encourage, and in certain instances, to require collective bargaining between carriers and their employees, through designated representatives, as a means of effecting the settlement of disputes between carriers and their employees which might tend to interrupt the flow of commerce or the operation of a carrier engaged in interstate commerce.

Congress encouraged the *making* and *maintaining* of collective bargaining agreements concerning rates of pay, rules or working conditions between carriers and their employees

(Section 2, First) through *representatives*, "designated by the respective parties in such manner as may be provided in their corporate organization, unincorporated association, or by *other* means of *collective action*" (Section 2, Third), and provided that "all disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, *in conference between representatives*, designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute" (Section 2, Second).

While all disputes between a carrier and its employees were required by Section 2, Second, to be considered, and, if possible, decided, with all expedition, in conference between representatives of the parties interested in the dispute, Section 2, Fourth, Fifth, and Section 6 of the Act outlined the particular mode of procedural processes to be complied with respecting attempted mediation of two specified classes of disputes. Section 2, Fourth, outlined the procedure to be complied with in disputes between a carrier and its employees "arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."

Section 2, Fifth, provided:

> "Disputes concerning changes in rates of pay, rules, or working conditions shall be dealt with as provided in Section 6 and in other provisions of this Act relating thereto."

Section 6 provided for notice to and an attempt to arrange a conference between representatives of the parties interested in an intended change, before any change should be made.

In each of these two specified classes of disputes, Congress imposed upon the designated representative or repre-

sentatives of the carriers and of such employees, the duty to give notice and to attempt to agree upon (Section 6) or specify (Section 2, Fourth) a time and place for conference between the representatives of the parties interested in the dispute, so that the dispute should be considered, and, if possible, decided with all expedition, in conference between such representatives of the parties (Section 2, Second). Congress specifically enacted a statutory prohibition against a carrier altering rates of pay, rules, or working conditions, in effect at the time of the passage of the Act, until after the representatives of the carrier and the representatives of the employees had exerted every reasonable effort to consider such disputes in conference (Section 6).

The legal obligations of the respondent and the legal rights of the employees, which were violated in the present case, are set forth in Section 2 of the Railway Labor Act.

Section 2, read as a whole, shows a clear purpose on the part of Congress to provide for the maintenance of harmonious labor relations in interstate commerce, *through the establishment of employment relations by contracts engendered through collective bargaining.* It is the essence of a contractual obligation that it shall be *voluntarily* assumed.

The mandatory duty to treat with or confer with the duly authorized representatives of the employees, rests upon Section 2, First, and Second, of the Railway Labor Act of 1926. This Section, First and Second, were not changed by the 1934 amendments to the Railway Labor Act.

The language of these paragraphs is much the same as that used in Title III, Section 301 of the Transportation Act of 1920. A construction of that section by this Court, however, in *Pennsylvania Railroad System and Allied Lines*

Federation No. 90 v. *Pennsylvania Railroad Company*, 267 U. S. 203, 216, indicated that the First and Second paragraphs of Section 301 did not create an enforceable obligation.

At the time Section 2 of the Railway Labor Act of 1926 was being considered by the House Committee on Interstate and Foreign Commerce, it became apparent that the language of Section 2, First and Second permitted enforcement by judicial process.*

These paragraphs have been further strengthened in the amendments to the Railway Labor Act of 1934, which greatly enlarge the scope of the enforceable obligations. Section 2, Tenth, provided certain penalties for failure to publish a notice prescribed by Section 2, Eighth, informing employees all disputes will be handled in accordance with

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*Mr. Richberg, who explained the bill to the House Committee on Interstate and Foreign Commerce, testified as follows in answer to questions as to whether Section 2, paragraphs First and Second, were enforceable (Hearings on H. R. 7180, 69th Cong., 1st Sess.):

"I think any action involving an arbitrary refusal to comply with that duty might be subject to judicial compulsion. • • • In other words, I think it would not be exerting a reasonable effort to make and maintain agreements, for a carrier or its appropriate officers to refuse to even meet a committee that sought to make an agreement" (P. 84).

• • • • •

"I think that a duty imposed by law is enforceable by judicial power. Of course, this is not a duty which could be enforced in a very absolute way, because it is a duty to exert every reasonable effort. In other words, all that could be enforced by the court would be an order against an arbitrary refusal to even attempt to comply with that duty, but I believe that could be subject to judicial power" (P. 85).

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"In the first place, it is their duty to exert every reasonable effort • • • to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. In other words, the legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion" (P. 91).

the requirements of the Act. Such handling necessarily required conferences as that term was used in paragraphs First and Second of Section 2. It would be absurd to argue that Congress intended that a carrier should be prosecuted and penalized for failure to notify employees that it will hold a conference, but that it should not be under a legal obligation to fix a time and place to hold a conference.

Therefore, in seeking to have employment relations harmoniously established and maintained in interstate commerce on the basis of contract, Congress not only made it the *duty* of the parties to make every reasonable effort to make and *maintain* agreements, but also made it the *duty* of carriers and employes to confer through "representatives designated and authorized so to confer," and made it the *duty* of both parties to refrain from exercising any influence over the selection or action of the agents of the other party, which would result in fraudulent, non-enforceable contracts.

It must be assumed that members of Congress, like all other persons familiar with industrial relations and with controversies between employers and employe organizations on the railroads and elsewhere, know that the refusal of employers to "recognize" employe organizations and their representatives, and to confer with them, has been a most prolific source of controversy and a frequent cause of strikes. The Railway Labor Act was clearly written upon the theory that if the parties could be legally obligated, at least to meet and to discuss their differences, and if then a machinery of government mediation and opportunity for arbitration could be provided, there would be every reason to expect that most, if not all, labor disputes would be peaceably determined. The entire efficacy of the Act, therefore, would depend upon providing assurance at the outset that each party *could compel a consideration* of its position

by the other party *and could be assured* that, if any agreement were reached, both parties would be legally obligated to perform it because the validity of the contract made by duly authorized representatives could not be challenged.

Therefore, in addition to the provisions of the first three paragraphs of Section 2, it was provided in the Fourth and Fifth paragraphs that conferences must be held in regard to the two large classes of disputes commonly arising on the railroads. The Fourth paragraph covered disputes "arising out of grievances or out of the interpretation or application of agreements, concerning rates of pay, rules or working conditions." The Fifth paragraph covered "disputes concerning changes in rates of pay, rules or working conditions."

A mere reading of the provisions of this Section of the Act alone shows a clear intent on the part of Congress to make sure that the terms and conditions of employment on the railroads shall be fixed by contract and that such contracts shall not be applied, interpreted or changed, except in conjunction with an opportunity for the employes concerned to be heard and to be represented through duly authorized agents. The obligations which are written into the law are unmistakable. The intent of Congress to impose such obligations is clearly manifested in the repeated use of the word "shall," which stands in marked contrast to the use of the permissive word "may" in such provisions as that in Section 5, which provides that either party to the dispute *may* invoke the services of the Board of Mediation, or the provisions of Section 7, of the Act of 1926, that a controversy "*may* by agreement of the parties to such controversy be submitted to the arbitration of a board of three." When the subsequent sections of the Railway Labor Act are examined to find whether Congress had any intention to make legally enforceable these rights and duties defined in Section 2, we find that the whole machinery

devised by Congress for the settlement of disputes becomes futile and ridiculous, unless there is a legally enforceable right in the employes to select their own representatives without coercion from the other side and to obtain consideration of their interests through conferences between their duly authorized representatives and the representatives of management.

When each Section following the statement of duties in Section 2 is considered the necessity for the enforcement of the previously expressed obligations becomes even more obvious.

The record in this case shows that the employees in this craft and class, designated joint-railroad express agents, have for many years, since 1909, negotiated with the predecessor express company employer agreements concerning rates of pay, rules and working conditions. None of the respondent's predecessor companies nor the Director General, ever entered into individual contracts or with minorities and never manifested a desire to do so. When railroad agents were checked in by the route agent for the Express Agency they did not sign or negotiate any contract. They were hired under the conditions expressed in the collective bargaining agreements.

What is true of respondent is generally true of all the railroad industry. Agreements filed with the National Mediation Board pursuant to the express mandate of Section 5, Third (e) of the Act, as amended June 21, 1934, shows that carriers do not customarily have more than one standard of rates of pay, rules or working conditions for a craft and class.

The District Court in its opinion said on this subject (R. 348):

> "In view of the manifest purpose of the statute now under consideration it would seem that in such circum-

stances any sanction of individual agreements contrary to the terms of the collective agreement, made by one employed and working under it, would permit, and indeed encourage, the violation of the "treaty," *Yazoo & M. V. R. R. Co.* v. *Webb*, 64 F. (2d) 902, and therefore should not be permitted. By such means the entire structure of the collective agreement could be broken down. If changes may be effected in sixteen instances out of three hundred, they may be multiplied until one hundred and sixty changes may be effected, and what began as an agreement of the majority be reduced to the contract of a minority. If changes in compensation may be made, other conditions may be required which could well result in the nullification of the employee's right to freely choose his representatives for collective bargaining and the adjustment of disputes. It is not difficult to conjecture the difficulty of maintaining the social peace between interstate rail carrier-employer and its employees, so plainly sought by the statute, if varying contracts of compensation existed between those in similar employment, and if such employees be held accountable for any yielding to the mass power of the employer directed against him as an individual. Congress has declared such matters to be impressed with a public interest, and any individual agreement is not a matter of concern alone to the contracting parties."

Attempts on respondent's part to negotiate separate agreements met with a protest from joint railroad-express agent Dinkins. He declined to accept any reduction of the commission rates unless it was uniformly applied on the Seaboard Air Line Railway property (R. 88). Following receipt of the respondent's letter, providing for a commission of $5.00 a car as compensation on each carload shipment forwarded from such agent's office, Dinkins had the assistance of the route agent Davis, "in preparing his statement showing the amount due him for his services to respondent" (R. 89). Thereafter, on March 25, 1930,

and April 8, 1930, the two superintendents of respondent notified all joint railway-express agents on the Seaboard Air Line Railway, that on and after April 10, 1930, the compensation for handling a carload shipment by express would be $5.00 per car (R. 66). Dinkins was not a duly authorized representative of petitioner. The proposal to reduce the rate of pay provided in the agreement of 1917, was made to him alone. No communication was addressed to any authorized representative of petitioner by respondent, who had the power and authority to negotiate, treat with, or meet with respondent in conference concerning the dispute referred to in Section 5 of the Act of 1926 and to be handled in accordance with the procedural processes enumerated in Section 6 of that Act.

Would a notice sent under Section 6 of the Act of 1926 by a representative of a carrier ("designated and authorized so to confer") to any person other than the representative of the employees ("designated and authorized so to confer"), meet the requirements of the statute? The first duty placed upon the recipient of the notice is that he attempt to agree "within ten days after the receipt of the notice," upon "the time and place for conference between the representatives of the parties interested in such intended changes." Can it be said that the notice so provided was intended to be given to any person other than the representative so designated to confer? Can it be said that Congress intended the notice to be given to some individual employee and that such individual employee should have a duty to make an agreement with the representative of the carrier as to the time and place for conferences between the representative of the carrier and the representative of the employee? We do not think so. The notice obviously was to be sent to the authorized representative of the employees who could reach an agreement as to the time and place of a conference between himself and the representative of the carrier. The provision

of Section 2, Second, that *all* disputes be considered "with all expedition" in conference between representatives, precludes toleration of the delay which would arise upon notice not being sent directly to the representative designated and authorized so to confer. The notice contemplated is a notice to the *representative* of the employees, and not otherwise. Whether the disputes in this case be considered as having arisen under Section 2, Fourth, or under Section 6, they were disputes under Section 2, Second, and were required to be "considered, . . . with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier and the employees thereof interested in the dispute."

Congress froze the rates of pay, rules and working conditions which were in effect between carriers and their employees by the provisions of Section 6, and provided further that such frozen "rates of pay, rules and working conditions shall not be altered by the carrier . . . unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Board of Mediation."

Aside from the provisions of Section 6, there was provided certain subsequent procedure, mandatory in character, which indicates the extent to which Congress has gone to safeguard railroad employees against summary and arbitrary alterations of rates of pay, rules or working conditions prescribed in their collective agreements with carriers. As outlined in the foregoing section, following the giving of notice, the Act requires holding of conferences between the parties. Where such conferences are unsuccessful, either party may invoke the services of the Board of Mediation, or the Board may proffer its services (Section 5, First, Act of 1926). That section places the duty of the Board of Mediation "as its final re-

quired action," if its efforts to bring about a settlement through mediation have been unsuccessful, to induce the parties to submit to arbitration. In the event that the dispute be not adjusted under the foregoing provisions of the Act, and an emergency Board is created under Section 10, for thirty days thereafter, no change shall be made by the parties to the controversy in the conditions out of which the dispute arose.

It is undisputed that no notice as provided in Section 6 was given to the authorized representatives of the employees of intention to alter the rates of pay provided in the collective agreement. The record is devoid of showing that Section 6 was complied with, and there was no contention either in the Express Agency's pleading or argument to the court that the duty of giving notice under Section 6 of the Act was complied with. The District Court in the opinion held (R. 351) "The notice was not in compliance with the terms of the Railway Labor Act of 1926 in effect at that time." The District Court, in its additional findings of fact (R. 356), found: "(7) No notice was given by the agency to the representatives of the joint agents of the carrier's intention to change the terms of the agreement of August 1, 1917, as provided in Article 14 of the agreement, nor was any notice given in compliance with the terms of Section 6 of the Railway Labor Act of 1926, in effect at that time."

This finding, that the notice of the change of rates of pay was not in accordance with the terms of Section 6 of the Act of 1926, was not excepted to and was not specified in the statement of points to be relied upon on appeal (R. 360-363).

It cannot be successfully denied that the Express Agency was attempting to change a collective agreement embodying a whole class into a large number of individual contracts embodying all the members of that class. The individual contracts between a carrier and its employees, made in the

manner which the Express Agency attempted to use in this case, are not the types of individual contracts which were approved in the case of *Virginian Ry. Co.* v. *System Federation No. 40, etc.*, 300 U. S. 515.

It would appear that the language employed in Section 2, Fifth, and Section 6, of the Act of 1926, would furnish no means of escape from the conclusion that the duties required by the sections are mandatory and that no change affecting rates of pay can be validly accomplished without giving the thirty days' notice and following subsequent procedural processes.

These sections are substantially the same as corresponding sections contained in the 1934 amendments to the Act of 1926, except for the imposition of criminal penalties. Their purpose and effect clearly is to insure that the rates of pay, rules, or working conditions, provided in collective bargaining agreements between carriers and employees will not be changed except by negotiations between the parties or by mediation if necessary and such conferences have been initiated and concluded. These sections are important concomitants of the statutory plan to require joint conferences between authorized representatives of the parties and exhaustion of the machinery for mediation and arbitration before any action is taken which might result in the interruption of service. Experience has shown that through such conferences and mediatory processes numerous disputes can be adjusted between the parties.

The commands and prohibitions of these sections are clear and positive. The use of the word "shall" indicates that the direction is mandatory. It is the language of command, not advice (*Escoe* v. *Zerbst*, 295 U. S. 490, 493). When the purposes of the act are considered, there can be no doubt that the requirements of the Act for the giving of notice, etc., are mandatory upon the carrier employer. (*Virginian*

Ry. Co. v. *System Federation No. 40*, 300 U. S. 515, 542, 545). Were the requirements of the Act advisory, the procedure herein outlined, which is designed to facilitate voluntary adjustment of disputes by requiring the *status quo* to be maintained after the giving of notice and until at least thirty days after Mediation has failed or the Emergency Board has made its report, would be useless.

The Act, as amended June 21, 1934, strengthened the making and maintaining of agreements and prohibited arbitrarily altering rates of pay prescribed in agreements by the addition of Section 2, Tenth, providing that a willful failure or refusal of a carrier, its officers or agents to comply with the terms of Section 2, Seventh, is a misdemeanor and punishable by fine or imprisonment, or both. The provisions of Section 2, Seventh, may be compared to Section 2, Fifth, of the Act of 1926.

The Act, as it stood in 1926 when first enacted, imposed definite and enforcible obligations notwithstanding the absence of statutory penalties (*Texas & N. O. R. R. Co.* v. *Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 567, 569). Criminal sanctions were plainly not necessary to the enforcement of the provisions of the Act, they were added by the amendment of 1934 (Section 2, Tenth), to prevent a carrier from changing rates of pay, prescribed in a collective agreement unless such change be made in conformity with procedural processes set forth in Section 6 of the Act.

An effort on the part of a carrier to change rates of pay, etc., without giving the thirty days' notice required by Section 6 was enjoined in *Railway Employees Coop. Assn.* v. *Atlanta B. & C. R. R. Co.* (D. C. Ga. 1938) 22 F. Supp. 510, where the prohibitory and mandatory effect of Section 6 was recognized.

In a case arising under the Newlands Act (Public No. 6, (63rd Congress) approved July 15, 1913), a prohibition sim-

ilar in effect was enforced. Section 9 of that Act provided that whenever receivers appointed by a Federal Court were in possession of a railroad "no reduction of wages shall be made by such receivers without the authority of the court therefor, after notice to such employees, said notice to be given not less than twenty days before the hearing upon the receivers' petition or application. • • • •" In *Birmingham Tr. & Sav. Co.* v. *Atlanta, B. & A. Ry. Co.* (D. C. N. D. of Ga. 1931) 271 Fed. 731, an order of the court authorizing a reduction of wages without the delay of twenty days was held to be without legal effect. The court upheld the validity of the Act in that case.

The Railway Labor Act of 1926 applied to the facts in this case was and is controlling as to the issues involved. The District Judge so construed and applied the Act. In his opinion (R. 351) the District Judge held as to the notice relied upon by the Express Agency:

> "This notice was not in compliance with the terms of the Railway Labor Act of 1926, in effect at that time. It purported to be effective immediately, thus not giving the required thirty days' notice and failed to give the time and place for conferences between the representatives of the parties interested in such intended changes. It was, therefore, impossible to provide the time for conferences provided by the Act.
>
> "Thus without regard to the question as to whether the notice should have been served upon the bargaining representative or the employees, the notice failed to comply with this important provision of the statute and could well be disregarded by the employees. This action by the carrier, as well as the negotiation of the individual agreements, doubtless resulted from the position of the carrier that it was not bound by the 1917 agreement, and its further position, now abandoned, that no employer-employee relationship existed between it and the joint agents. These questions having

been determined adversely to the carrier's contention, the means then employed to obtain relief from what it deemed to be burdensome terms of employment, are rendered ineffectual, and the defendant carrier is obliged to comply with the terms of the award as sought to be enforced in this proceeding."

The conclusion of the District Judge that "It was, therefore, impossible to provide the time for conferences provided by the Act," is correct. There is no question as to the dispute having been one "concerning intended changes in rates of pay."

II.

When two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous.

The National Railroad Adjustment Board, in its award No. 298, on the question of jurisdiction (R. 224), found:

1. Express commissions are inextricably interwoven with the wages which railways contract to pay agents. Because of the close property relationship between the Railways and the Express Agency, that the railway by which an agent is primarily employed and the Express Agency by which he is secondarily employed, are jointly and severally obligated to maintain the wage structure of agreements, insofar as express commissions are found to be an essential factor in determining the wages to be paid by the railway (R. 236).

2. In any case where express commissions were considered in establishing the wage scale for agents on any railway, an obligation exists either to maintain the rate of commission intact or adjust the wage scale to compensate for changes in the rates of commissions until such time as the wage rates or the commissions, or both, are changed in

accordance with Section 6 of the Railway Labor Act. (R. 232).

In the award No. 548 on the merits, the Adjustment Board concurred in the opinion rendered in award No. 298, and found (R. 7, 16):

1. That the contract of 1917, was in existence and did exist in which the joint railway-express agents making individual agreements with the Express Agency, had previously made an agreement with the representatives of the Telegraphers and so long as they were parties to that agreement they were bound by it, and so long as that agreement was in force any agreement subsequently made which was at variance with that original agreement was void unless the original agreement has been removed or voided by the same process as when it was made; that it was further invalid and a violation of the principles of that agreement unless negotiated and ratified between the principals of the original agreement.

2. That the agreement of August 1, 1917, was an agreement between the Telegraphers and Southern Express Company and was in turn assumed and observed by its successor companies, and that no notice having been served by either of the parties to change or terminate such contract under the terms of Article 14 thereof, that the contract remains in full force and effect.

Respondent took issue only with the findings of the Adjustment Board that (1) it had jurisdiction of the dispute, (2) that the Express Agency was bound by the agreement of August 1, 1917.

The District Court concurred in the findings of the Adjustment Board and entered judgment on the award. The court below concurred in the findings of the District Court that the Adjustment Board had jurisdiction and that the

respondent assumed and operated under the contract of August 1, 1917 (R. 372).

On the questions of fact involved in the dispute submitted to the Adjustment Board both Courts below affirmed the findings that the Adjustment Board had jurisdiction and that the respondent in fact assumed, and operated under, the contract between the Telegraphers and the Southern Express Co. Under the long established rule, this Court accepts the findings in which two Courts concur, unless clear error is shown. *Texas & N. O. R. Co.* v. *Brotherhood of Railway & S. S. Clerks*, 281 U. S. 548, 558; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 542-545; *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, 4.

Section 153(p) of the Railway Labor Act, as amended, under which the suit for the enforcement of the award was instituted, was taken bodily, with a few minor exceptions not here material, from the Interstate Commerce Act, Title 49, Section 16(2) providing for the enforcement of reparation orders.

In *Tift* v. *Southern Railroad Co.*, 138 Fed. 753, affirmed 148 Fed. 1021, the Court held that explicit law, the settled policy of the Government, and the practical principles of reason and justice require that the national courts should not discredit the conclusions of the commission. This Court in 206 U. S. 428, affirmed the above principle.

The application and enforcement of the foregoing section by the Federal Courts were known to the framers of the 1934 amendments to the Railway Labor Act. It would seem that the clear intention of Congress in adopting the identical provision in the Railway Labor Act for the enforcement of awards rendered by the Adjustment Board was to authorize the Federal Courts to apply the same

enforcement and to follow the same standards established under the provisions of the Interstate Commerce Act. If Congress intended the Federal Courts to apply other standards than the ones already established under the Interstate Commerce Act, it would presumably have so stated in the Railway Labor Act as amended.

The determination of the issue by the Adjustment Board, composed of men "appointed by law and informed by experience" should not be taken lightly, but should be given the full weight and consideration accorded by the Federal Courts to the rulings of the Federal Administrative bodies who are charged with the performance of duties prescribed by Congress in the interest of maintaining an uninterrupted flow of interstate commerce.

As was stated in the Sixth Annual Report of the National Mediation Board (p. 8):

> "The function discharged by the Adjustment Board is necessary to the effective day to day observance of labor agreements, for if either party may violate the terms of such contracts with impunity the agreements become meaningless. Such agreements are in effect, codes of law outlining the rights, privileges and obligations of the carriers on the one hand and their employees on the other. And it is just as essential to have a judicial body (Adjustment Board) to arbitrate disputes which arise under a code of labor laws as it is to have our system of courts to dispose of controversies which arise under public laws or out of the application of private contracts."

As to the great weight to be given by the Courts to the determination of Federal Administrative Boards, the decision of the Supreme Court in *Gray* v. *Powell*, 314 U. S. 402, 411-413, is applicable here. The Court there said:

> "In a matter left specifically by Congress to the determination of an administrative body • • • the

function of review placed upon the courts is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 180, 181, 184, 185, 187.

> Such a determination as is here involved belongs to the usual administrative routine. * * * Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. * * * It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."

The Court below engaged in a review of the Adjustment Board's findings and award, upon the record before the Adjustment Board and the Stipulation of Facts entered into between petitioner and respondent. The testimony introduced before the District Court by respondent through the only witness appearing for the respondent, in substance was no different from that contained in his affidavit and filed before the Adjustment Board following the award that the dispute should be heard on its merits (R. 248). Accordingly, it is the position of petitioner that the respondent had not overcome the prima facie effect to be given the finding and order of the Adjustment Board and of the facts therein stated. The findings and the award made by the Adjustment Board as well as the findings or decisions of other federal administrative agencies made in the exercise of the statutory authority to determine the issues before it, is conclusive, if supported by substantial evidence, even in the absence of express statutory language to that effect. See *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125

(Federal Communications Act); *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177 (Railway Labor Act); *Swayne & Hoyt Ltd.* v. *United States*, 300 U. S. 297 (Shipping Act); *Silberschein* v. *United States*, 266 U. S. 221 (War Risk Insurance Act); *Wheeling Corrugating Co.* v. *McManigal*, 41 F. (2d) 593 (Longshoremens and Harbor Workers Compensation Act).

The above principle is based upon a recognition by the courts of the peculiar fitness of administrative agencies by reason of their expert knowledge of the subject matter to make findings and decisions entrusted to them as was set forth by the Supreme Court in *Gray* v. *Powell*, supra. The members of the Adjustment Board are informed by experience of long standing of the nature and effect to be given collective bargaining agreements promulgated between carriers and their employees according to crafts and classes. The courts therefore have determined that they will not substitute their judgment for that of the administrative body even though upon a consideration of all the evidence the Court might reach a different conclusion. *Swayne & Hoyt Ltd.* v. *United States*, 300 U. S. 297, 304. "So long as there is warrant in the record for the judgment of the expert body it must stand * * *. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question." *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 146. To hold otherwise would make the Board "but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action." *United States* v. *L. & N. R. Co.*, 235 U. S. 314. "The judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-287.

The conclusions of the Court below as to, "the state of the law governing suits on contracts between employers and unions," and its definition of the rights of all parties under such contracts, is contrary to the definition of the rights of the parties to labor agreements as defined over the years by men "appointed by law and informed by experience," who served upon the several Administrative Boards established by Congress to perform the function of interpreting and applying labor agreements.

In the appendix we set out a list of decisions of the United States Railroad Labor Board, created under the Transportation Act of 1920, and of the National Railroad Adjustment Board, created by the Railway Labor Act of June 21, 1934, wherein these Boards consistently held that no changes in an agreement covering rates of pay, rules, or working conditions could be effected by a carrier without notice to the signatory representative of the employees.

III.

The threats to remove the agency unless the individual employee accepted a lower rate than provided in the agreement is tantamount to an interference with the employee's representation by the Telegraphers.

The wholesale change in rates of pay was effected as a result of an agreement reached with Dinkins, the joint railway-express agent, at Lawtey, Florida, November 29, 1929, "with the understanding the practice will be general on the Seaboard Air Line" (R. 88).

The Express Agency, in order to secure the possible advantage of Dinkins' conditional agreement to accept $5.00 per car on car lot shipments, had to comply with the condition prescribed by Dinkins by making "the practice general on the Seaboard Air Line." It therefore sent out the notices

of March 25, 1930, and April 8, 1930, for the purpose of making the rate of $5.00 per car general on the Seaboard Air Line effective April 10, 1930.

As to the consent to the arrangement on the part of joint railway-express agents, Smith and Meares, and which was typical of the consent of other agents whose claims were denied by the Court below, the record shows:

Paul Smith, Emory, Georgia (R. 78-81).

On April 29, 1930, joint agent Smith wrote Superintendent May that it would "be necessary for him to take the regular commissions on car load shipments as there are no provisions being made on such shipments in the contract." The Agency sent agent Smith "error letters" charging him with the difference because Smith continued to deduct "the usual percentage rate of agency commissions." The company ended Smith's employment on August 7, 1931, and set up the express agent successor to Smith, at a location other than the Seaboard Air Line Railway station. On October 5, 1931, Smith meekly capitulated to the dictation of the Express Agency and agreed to accept $5.00 per car and was promptly checked in again as agent at Emory for the Express Agency.

E. Meares, McBee, S. C. (R. 98-99).

The letter of joint agent Meares to Harrison, route agent for the Express Agency, dated June 16, 1930, clearly reveals that the company had threatened to separate him from his agency, as it had done Smith at Emory. So Meares, in succumbing to the interference, influence and coercion on the part of the express Agency's representative, Mr. Harrison, agreed to refrain from handling the matter with the general Chairman and to accept the $5.00 per car rate. He was thus interfered with, influenced and coerced, in his designation of a representative by the car-

rier, in violation of Section 2, Third, of the Railway Labor Act.

The viciousness of the scheme adopted is that it deprives the employees of the right which experience shows it advisable for them to have, and which Congress has unequivocally declared they shall have, namely the right to bargain with management and accordingly have a voice and authority, through authorized representatives, in determining what the rights of the employees shall be.

The inescapable result of the action of the Express Agency is that if it may validly adopt this method of altering rates of pay, other carriers may pursue a similar policy with the same showing of justification. The inevitable outcome will be economic warfare caused by evading the procedural processes Congress has mandated shall be followed to avoid such strife.

The duty of the Express Agency to *maintain* agreements with its employees prescribed by the Act of 1926, obviously includes the duty to refrain from using tactics expressly condemned by the Act for the purpose of breaking down an existing agreement.

The provisions of the Act requiring good faith in the *making* of collective agreements is useless if, after such agreements are made, the carrier can emplcy the sabotage tactics of interference, influence and coercion of helpless individual employees to destroy the structure which was erected in good faith. The Act compels the same good faith in the *changing* of collective bargaining agreements as it requires in their making.

Can it be that a carrier, like the Express Agency is by statute required to *specify* a time and place to confer with the representative of its employees where they have a grievance, (Section 2, Fourth) but is not under a legal obligation to attempt to *agree upon* (Section 6) a time and

place for conference with representatives of its employees when it wishes to change the rates of pay and working conditions of its employees?

We contend that the representative, for the purposes of the Railway Labor Act of 1926, designated by a craft or class of carrier employees in accordance with the provisions of Section 2, Third, of said Act, has the exclusive right to confer and agree with the representatives of said carrier respecting any and every intended change proposed to be made in an existing collective agreement governing rates of pay, rules, and working conditions of said employees, and that the representatives of the carrier can not execute a valid agreement with any individual employee of said craft or class which will effect a change in the terms of his employment as fixed by the existing collective agreement.

This Court in *Virginian Railway Company* v. *System Federation No. 40*, 300 U. S. 515, 548-549, did not by its decision construe the Railway Labor Act as sanctioning the conduct of a carrier in the making of individual contracts with its employees, who were already governed by the terms of an existing collective contract, whereby the terms of employment could be changed from those prescribed in the collective contract.

The decision of the court below in holding that a carrier may secure individual agreements with its employees although covered by a collective bargaining agreement, failed to consider the prohibitions contained in Section 6 and related Sections of the act against such action. This ruling of the court is based upon the fact that the lower rates of pay dictated by the carrier were accepted by the employees and that such acceptance prevented them and the organization for them to recover the difference, notwithstanding the provisions of the Railway Labor Act. If we

were to follow this theory of the court below to its ultimate conclusion, employees covered by a collective bargaining agreement would find no security in the rates of pay, rules and working conditions covered therein, and by the same token would not be in a position to rely upon representation of its collective bargaining agent to secure for them all of the benefits provided for in such an agreement. Collective bargaining would be useless and the faith of employees in negotiations between management and employees representatives could not long endure.

In *Burke* v. *Morphy*, 109 F. (2d) 572, cert. den. 310 U. S. 635, this Court refused to review the decision of the Circuit Court of Appeals which set aside a wage cut order of a District Judge ordering the receiver of a railroad carrier to cut wages of the railroad's employees because the receiver had no money to pay the wages fixed in the collective bargaining agreements, and holding that such order was without legal justification because the Railway Labor Act "forbids any intended change in an agreement affecting rates of pay unless thirty days' notice is given to the other party to the agreement." Pay checks given employees in that case contained an endorsement purporting to constitute an acknowledgment of full payment for services up to and including the date of the draft.

In this case the Telegraphers organization as representing the joint railway-express agents was well within its rights in its position that the Express Agency was violating the Railway Labor Act in making the changes with respect to rates of pay. Since the act of the Express Agency contravened the plain prohibition of the Act it was a nullity, and until the rates of pay, or the agreement affecting rates of pay were changed in accordance with the provisions of the Act, the joint railway-express agents, were entitled to their pay under the terms of the agreement as it existed

March and April, 1930. This would be true even without a protest on the part of the employees, but by making the protest shortly thereafter the employees made doubly sure that they were not accepting any part of the Express Agency's arbitrary alteration.

IV.

Individual employees cannot change terms of union contract by individual contracts with their employers.

This point was decided by this Court as now contended for by petitioner in the case of *Williams* v. *Terminal Co.*, 315 U. S. 386, 399-403, when it construed Section 2, First, Second, and Seventh of the 1934 amendments to the Railway Labor Act, and when it construed and compared Section 6 of the Act of 1926, with Section 6 of the 1934 amendments. This Court said (p. 399):

> "The object of the Act is to avoid interruption to commerce through the promotion of free association among employees for the purpose of settling disputes between them and the carriers. Section 2. To assure continued operations, *changes by carriers in agreements reached through collective bargaining, pending negotiation, are prohibited.*" (Italics ours.)

Continuing on page 400, this Court said:

> "Section 2, Seventh, note 11, *supra*, forbids changes of pay or working conditions of employees 'as a class as embodied in agreements' except as provided in Section 6, note 11, *supra*. The crucial Section 6 is phrased so as to leave no doubt that only agreements reached after collective bargaining were covered. Section 2, Seventh, first appeared in the 1934 amendments to the Railway Labor Act, and Section 6 was likewise then amended by adding 'in agreements'—to that section's former requirement of notice of 'an intended change affecting rates of pay, rules, or working conditions.'

Compare Section 6, 44 Stat. 582, with Section 6, 48 Stat. 1197. The additions point squarely to limiting the bargaining provisions of the Railway Labor Act to collective action."

Continuing on pp. 402-3, this Court said:

"Because the carrier was, by the Act, placed under the duty to exert every effort to *make* collective agreements, it does not follow that, pending those negotiations, *where no collective bargaining agreements are or have been in effect*, the carrier cannot exercise its authority to arrange its business relations with its employees in the manner shown by this record. • • •

The institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibition of Section 6 against changes of wages or conditions pending bargaining and those of Section 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agreements. Arrangements made *after collective bargaining* obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose." (Italics ours.)

The addition to Section 6 of the words "in agreements" in the 1934 amendments did not change the law, when applied to the facts in this case, as it stood in the 1926 Act. Here there was in effect an existing agreement arrived at after collective bargaining. The duties placed upon carriers to exert every reasonable effort to make and *maintain* agreements were the same in both the 1926 Act and the 1934 amendments to that Act. (Section 2, First.) Since the carrier was under the duty to *maintain* a collective agreement with its employees covered by the contract of August 1, 1917, changes in that agreement could be made only after negotiation and conference with petitioner.

Section 2, Seventh, of the 1934 amendments replaced Section 2, Fifth, of the 1926 Act, relating to the procedure

for changing rates of pay in existing collective agreements. Section 2, Fifth, of the 1926 Act governs this case. It reads:

> "Disputes concerning changes in rates of pay, rules, or working conditions shall be dealt with as provided in Section 6 and in other provisions of this Act relating thereto."

Section 6 required that written notice of at least thirty days be given of an intended change affecting rates of pay, rules, or working conditions, and that "the time and place for conference between the *representatives* of the parties shall be agreed upon." This language clearly referred to collective bargaining, as distinguished from individual bargaining, because the conferences were to be between the *representatives* of the parties. So construed, the addition of the words "in agreements" to Section 6 in the 1934 amendments did not change the intent or scope of Section 6 of the 1926 Act, as applied to the facts in this case.

Section 2, Fifth, of the 1926 Act did, however, restrict the method of dealing with changes in rates of pay, rules, and working conditions fixed in existing collective agreements. It provided that such changes "shall be dealt with as provided in Section 6 and in other provisions of this Act relating thereto." Existing collective agreements were to be changed only in accordance with the Act, and not in accordance with the provisions of the existing contracts. The provisions of Section 2, Seventh, of the 1934 amendments permits the alternative method of changing collective agreements, i. e., "in the manner prescribed in such agreements or in Section 6 of this Act." The changes here were made in 1930, and were governed by Section 2, Fifth, Section 6, and other related provisions of the 1926 Act. Even if the carrier, under the 1926 Act, could change the agreement under the terms of Article 14 of the agreement,

the sending of notices to individual employees from two to sixteen days before the change was made, did not meet its duty to give thirty days' notice to the representative of the employees and exert every reasonable effort to make and maintain a collective agreement instead of a series of individual agreements.

While the decision in *Williams* v. *Terminal Co., supra,* is that the Railway Labor Act does not prohibit an employer from changing the terms of employment by ex parte action, *where a collective agreement is not and has not been in existence,* it would appear, a fortiori, that the employer would be prohibited from changing the terms by ex parte action, or by making individual agreements with employees who were covered by a collective agreement.

Respondent not only failed to exert every reasonable effort to maintain the collective agreement involved here, it denied its existence, disclaimed any obligation was imposed upon it by the Act, and sought to destroy the collective agreement by negotiating a series of individual agreements in violation of the Act. This respondent should not be given the benefit of any intention of substantial compliance with the law or the contract in the face of its deliberate defiance of the provisions of both. Its conduct has been bereft of any intention to recognize any of its obligations under the Railway Labor Act, has resulted in long and continuing violations of the Act, and has bordered closely upon, if it has not actually been, a violation of the criminal provisions of Section 2, Tenth of the 1934 amendments to the Act of 1926.

In *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 33-34, this Court reaffirmed for the fourth time:

> "That a single employee is helpless in dealing with an employer; * * * that union was essential to give laborers opportunity to deal on an equality with their

> employer; * * * that such collective action would be a mockery if representation were made futile by interference with freedom of choice."

These views were expressed when this Court had under consideration the Railway Labor Act of 1926, and the Act as amended in 1934. *Clerk's* case and *Virginian Railway* case.

Is an employee's helplessness in dealing with an employer terminated the moment his representative executes with the employer a collective agreement covering his craft or class? Is the employer then left free to negotiate with the employee individually for a reduction in the rates of pay which his representative secured for him in the collective agreement? May the employer threaten to remove the employee in the event the employee insists upon negotiating with the employer through his representative, and procure from the employee a valid individual contract waiving his rights under the collective agreement?

The lower court answered all of these questions in the affirmative when it held that a union contract is not "binding on the individual employees beyond their power to change the terms by individual contracts with their employers" (R. 374).

This ruling by the lower court can be correct only upon the theory that it was the intention of the Congress, in the passage of the Railway Labor Act, to perpetrate a collossal fraud upon all of the employees of carriers who should pay dues to promote collective bargaining with their employers. No other conclusion can be drawn than that the individual employee is more helpless to deal with an employer after he has paid dues to promote a collective agreement than he was before he spent the money. His economic position is weakened *pro tanto*.

We know that Congress had no such intention in the passage of the Railway Labor Act. However, the results will be the same if the Court should construe the Act to have that effect. No other recourse would be left to the employees to obtain their rights but to use their strike power to enforce their demands. The Congressional purpose to make collective action of employees an instrument of peace rather than of strife will be destroyed. The chaotic conditions which such a decision would create in the Nation is horrible to apprehend.

The court below in its opinion referred to previous rulings wherein it held that persons employed under the terms of a collective bargaining agreement have their tenure and rights governed by its terms and that for action taken contrary thereto, to their damage, there is a right of action in them or in the union to redress their grievances. The court below held, however, that the cases previously decided by it do not hold that contracts so made are binding on individual employees beyond their power to change the terms by individual contracts with their employer (R. 374).

An examination of the cases cited on this point by the court below in its opinion will show their inapplicability to the instant case.

In *Yazoo and M. V. R. R. Co.* v. *Webb*, 64 F. (2d) 902, the employee involved was employed as a porter. The class or craft had an organization but had no agreement or contract with the carrier. It was a case of individual hiring and accordingly the facts were unlike those in the instant case.

In *System Federation No. 59, etc.* v. *L. & A. Ry. Co.*, 119 F. (2d) 509, the court below said:

> "The only question with which we are here concerned is whether the seniority rights claimed, arise

out, and exist, because of, the 1929 contract, and persist during and only during its terms, or whether they indefinitely continue to exist after it has been abrogated, and the relations of employer and employee are no longer fixed and being carried on, under that contract, but for many years under rules promulgated by the company, and later under a contract between the company and the union which affirms that it 'covers all understandings now in effect' ".

Illinois Central R. Co. v. *Moore*, 112 F. (2d) 959, reversed by this Court, 312 U. S. 630, involved a cause of action instituted by a former employee of the carrier in a state court. The court below reversed the judgment in Moore's favor because of error in striking the carrier's plea of the state statute of limitations.

This Court in *National Licorice Co.* v. *Labor Board*, 399 U. S. 350, 354, 360, held that contracts "executed between the company and each workman individually and not as a collective agreement with representatives of the employees" were a violation of the National Labor Relations Act, in that, by their terms they "imposed illegal restraints upon the employees' rights to organize and bargain collectively as guaranteed by Sections 7 and 8 of the Act." The provision of the contracts was that the "question as to the propriety of an employee's discharge is in no event to be one for arbitration or mediation," and this court held "The effect of this clause was to discourage, if not forbid, any presentation of the discharged employee's grievances to appellant through a labor organization or his chosen representative, or in any way except personally."

The provisions of Sections 7 and 8 of the National Labor Relations Act, insofar as they are "aimed at the settlement of industrial disputes by the promotion of collective bar-

gaining between employees and the authorized representative of their employees, and by mediation and arbitration when such collective bargaining does not result in agreement" (*Virginian Railway Case*, p. 553), had their analogue in Section 2, Third, of the Railway Labor Act of 1926, which provided:

> "Third. Representatives, for the purpose of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

The letter from the Local Division Chairman Meares to Mr. Harrison, route agent for the Express Agency (R. 98-99) sets out the individual contract of Local Chairman Meares. Referring to the conversation with the route agent on that date relative to "*separation of express agency* at this point," Meares agreed to accept the offer of $5.00 per car and agreed that he would not handle "the matter further with the committee which represents us as agents over the Seaboard Sys." There could hardly be a more glaring case of interference, influence, and coercion of an employer over the self-organization or designation of representatives of the employees by the carrier than is established here. The carrier required Meares, as Local Chairman, to agree to withhold from the General Chairman further information of importance to every joint agent on his division, and to forego his and their rights to bargain collectively with the employer. This conduct of the carrier was identical with the conduct of the employer which was condemned by this Court in the *National Licorice Co.* case.

V.

The Circuit Court of Appeals erred in holding that the written notice given to every joint agent, and the securing of the consent to the arrangement of each agent affected, was all that was required to alter the rates of pay prescribed in the agreement of August 1, 1917.

The notices required by Section 2, Fourth, and by Section 6 of the Railway Labor Act of 1926 were notices intended to pave the way "for conferences between representatives." While Section 2, Second, did not set up a particular form of notice, it required all disputes to be considered in conference between representatives designated and authorized so to confer, and placed a duty upon the representatives of the carrier and of the employees to arrange a conference between them at which the dispute could be so considered. These provisions superseded the provisions of Article 14 of the Agreement permitting ex-parte or unilateral abrogation of the Agreement without conference between the representatives of the parties.

That this was the clear intention of Congress is evidenced by the third proviso of Section 2, Fourth, "That nothing in this paragraph shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties." The Act was intended to invoke the aid of conferences where there was no provision for them in existing agreements. The notices required by the statute were for the purpose of setting in motion the collective bargaining machinery. Representatives were given ten days from the receipt of the notice within which to specify (Section 2, Fourth) or agree upon (Section 6) a time and place for conference between representatives.

The holding of the Court below that "the securing of the consent to the arrangement of each agent affected" (re-

gardless of how obtained) was sufficient to support the change of rates of pay provided in the agreement, disregards the provisions of Section 6 requiring thirty days' notice and an effort to arrange conferences between the representatives of the parties interested in such intended changes, as a condition precedent to the right of the carrier to alter the rates of pay prescribed in the agreement.

An individual employee could not agree to the abrogation of the agreement affecting the whole class of employees covered by the agreement. So long as the agreement was in force and effect, any intended changes therein, whether affecting the whole class or an individual employee, were prohibited by the Act, unless changed in compliance with the provisions of Section 6.

This Court in construing the Railway Labor Act of 1926 in *Texas & N. O. Railroad Co.* v. *Brotherhood of Railway & S. S. Clerks*, 281 U. S. 548, upheld the constitutionality of the Act, and said on page 568 of the opinion:

> "A definite statutory prohibition of conduct which would thwart the declared purpose of the statute cannot be disregarded."

VI.

The fact that Congress made negotiation obligatory, and awards of the Adjustment Board prima facie causes of action is in itself a declaration of public interest and policy.

In *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 366, this Court in referring to the *Virginian* case said:

> "The effect of the decree was to order the employer to deal exclusively with the Federation, although the employee had a contract with an association not a party

to the suit found to be a dominated labor organization .... But in all, the public right was vindicated by restraining the unlawful actions of the defendant even though the restraint prevented its performance of the contracts."

The court below declined to follow the ruling of this Court in the *National Licorice* case, supra (R. 376), in that it construed this suit for an order to enforce the award of the National Railroad Adjustment Board as a suit upon a contract and not dealing with the assertion of public rights. This ruling by the court below is directly in conflict with the contrary ruling in the case of *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235, 242, decided by the United States Court of Appeals for the District of Columbia; affirmed by this Court by a divided Court, June 14, 1943, 318 U. S. ...., where the Court of Appeals held that the National Railroad Adjustment Board is a "Public agency" performing public functions, and therefore its decisions are not without legal effect.

The ruling of the court below also conflicts with the ruling of this Court, in the *Virginian Railway* case (p. 552), that:

"More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge * * *. The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing Courts to give relief."

VII.

The lower court's construction of contract clearly erroneous.

The court below erroneously construed the contract of August 1, 1917, in holding that (R. 376) "As to the claims in group one, there was no violation of the contract, because, under the undisputed evidence, carload express shipments of perishables were not within the contemplation of the contracting parties and were not included within its terms. Indeed they were not instituted until 1929."

The court below thus disposes of the judgments of all the claimants in its group one, notwithstanding that some were awarded judgments for carload shipments of commodities other than perishables. As to shipments from Emory, Georgia (R. 81) it appears that the carload shipments consisted of horses.

Contrary to the lower court's finding that the evidence was undisputed as to carload express shipments of perishables not being within the contemplation of the contracting parties, the evidence on this point is clearly in dispute. In Article III of the collective agreement effective July 1, 1909 (R. 121), and Article 2 of the collective agreement effective June 1, 1912 (R. 124), percentage rates of commissions were specified on *perishables* received and forwarded. Commissions for forwarding and receiving perishables were paid for at a rate different from the rate paid on other commodities. There was no mention in either of those agreements, which were succeeded by the contract of August 1, 1917, of the *quantity* of such shipments of perishables. The word "perishables" was excluded entirely from the contract of August 1, 1917, and the commissions for receiving and forwarding perishables were made the same as on other commodities, as disclosed

by the words "total business received and forwarded" in Article 2 (R. 19) of the contract of August 1, 1917. The *quantity* of shipment terms, such as "carload" or "less-than-carload", was not mentioned in either of said three agreements. The Express Agency paid the same commissions on "carload" shipments as on "less-than-carload" shipments at the rate provided under these agreements. Certainly it cannot be said that shipments of *perishables* by express were not within the contemplation of the parties when they made the agreement of August 1, 1917. Perishable shipments had been included in the two former agreements, and were not excluded by the agreement of August 1, 1917. Perishables were included in the latter agreement under the term "total business received and forwarded." Since perishables were express business all the time, and since no mention was made in any of the three agreements relative to the rates not applying on "carload" shipments, can it be said that a different rate should apply to "carload" shipments, or that such shipments were not within the contract? To have so held is to ignore entirely the fact that the Express Agency construed the contract of 1917 as including within its terms "carload" express shipments. It was stipulated by respondent (R. 86) that prior to 1929 "on the occasional carload shipments which moved by express, joint railroad-express agents on this line of railroad, whose compensation was on a commission basis, were allowed a certain percentage of the express revenue received on car-lot movements," • • • and it was further stipulated (R. 87) that "the scale of commissions so allowed was the same as that stated in Article 2 of the agreement between the joint agents and the Southern Express Company, dated August 1, 1917."

This Court will not ignore the plain fact that the letters sent out by Superintendents Scruggs and May (R. 137-139) to the joint railroad-express agents reduced the rate of

pay on *all* carload shipments regardless of the *commodity* shipped, and changed it from "the usual percentage rates of agency commissions" to "$5.00 a car on each carload shipment." The reduction was not limited to carload shipments of *perishables* alone, but applied to *all* commodities. The "usual percentage rates of agency commissions" were the same as those stated in Article 2 of the agreement.

The respondent construed the contract as requiring the payment of *percentage* rates of agency commissions on carload shipments of perishables, the same as upon other commodities, when its officials approached Dinkins to explain the 85% provision of Article V of the Standard Operating Agreement (R. 87) and obtained a written statement from Dinkins that "the *position* of the Express Company on the matter of Commissions on *car lot* shipments was outlined to me today and I am agreeable to accepting $5.00 per car on such shipments" with "the understanding that the practice will be general on the Seaboard Air Line" (R. 88).

There is no mention in Dinkins' letter that the reduction was to apply to perishable shipments alone. Perishables were not mentioned in the proposed agreement, and Dinkins cannot be said to have agreed to handle carload shipments of perishables out of Lawtey for a compensation of $5.00 per car, except to the extent that carload shipments of perishables were included in the term "car lot shipments", and then only in the event that all other agents on the Seaboard Air Line should be required to accept the same rate on "car lot shipments".

The fact that the Express Agency admits (R. 88) that after the *carload* strawberry business was taken over by the Express Company, that Scruggs was instructed by his superior in the Company organization to go back to see Dinkins a second time to secure a written statement from

him (R. 88), that he would agree to accept $5.00 per car on "car lot shipments" provided all other agents on the Seaboard Air Line accepted the same rate, would seem to be conclusive of the fact that the Express Company construed the contract of August 1, 1917, as including within its terms "carload express shipments of perishables" as well as other carload shipments. How can the conduct of the Company's officers in seeking this agreement from Dinkins be explained upon any theory other than that the company construed the contract of August 1, 1917, to cover all carload shipments, including carload shipments of perishables? Under no stretch of the imagination can we conceive of the Company requiring a written agreement which clearly purports to effect a *change* in rate of pay, without the company having first concluded that a rate of pay was then in effect on carload shipments.

That the Express Company first so concluded is evidenced by the fact that it approached Dinkins to obtain an agreement to *change* the rates.

The *change* was made as to "car lot shipments", and the rate on "car lot shipments" up to April 10, 1930, was the same as the rate on other shipments, that is, there was in effect a rate referred to by Superintendents May and Scruggs as "the usual percentage rates of agency commissions," specified in Article 2 of the contract of August 1, 1917.

The lower court cites authorities (note 5, R. 376) to sustain its holding that Article 12 of the collective contract is without effect to prevent changes in the transfer allowance to Carlton at Boykins, Virginia, and others in group three, so long as those changes do not fall below the $10.00 minimum for transfer allowance fixed by Article 3. The decisions cited are not applicable to the facts in this case. They merely hold that the Fair Labor Standards Act of

1938 does not prevent the employer and employee from contracting as to wages, provided the minimum wages or the maximum hours provisions of the Act were not violated. Article 3 fixed a minimum transfer allowance of $10.00 per month at points where agents are required to transfer express matter to or from other lines or trains, but this agreement for a $10.00 minimum was not to apply to all points, since Article 12 of the Agreement stated that this rule was not to be construed so as to reduce compensation at points where the rates of pay were in excess of the $10.00. Where a rate in excess of $10.00 was in effect at a point, such as Carlton's rate of $25.00 at Boykins, Virginia, Article 12 fixed the $25.00 rate as the minimum at that point. Had the rate been increased to $50.00 at that point, it could have been cut back to $25.00 without violating the agreement, but any reduction below $25.00 was a reduction below the minimum fixed by the contract at that point. That the respondent so construed the agreement is evidenced by the fact that it sought and obtained written agreement from Carlton (R. 97-98) that he would accept a lesser amount. The minimum rate at Boykins, Virginia, was not fixed by Article 3, but was fixed by Article 12 of the agreement, it having been stipulated (R. 96) that "before March 1, 1922, Boykins had been registered by the Agency as a point at which there was allowed any incumbent agent the sum of $25.00 for transferring express matter at that station".

VIII.

A State Statute of Limitations is no bar to a suit upon an award of The National Railroad Adjustment Board.

The court below has intimated that if it is in error as to the Telegraphers right to recover, it is in no doubt that the bar of the statute has fallen as to the amounts sued for

which accrued more than six years before the suit was filed. This ruling of the court is clearly erroneous for the reason that the suit is brought to enforce an award and order of the National Railroad Adjustment Board, and the cause of action accrued under the provisions of Sec. 153(p) of the Railway Labor Act, as amended. The only statutory limitation upon a suit brought for the enforcement of such an award is prescribed as two years under the provisions of Section 153(q) of the Act. This suit was brought within that time, and the award is enforceable in all of its terms under the provisions of the Act as interpreted by the Court of Appeals for the District of Columbia in *Washington Terminal Co.* v. *Boswell*, *supra*.

To permit the decision of the Court below to stand will pave the way for a wholesale evasion of the Act by a substantial portion of the railroads and other industries subject to related legislation.

An amendment was offered by the Chairman of the Committee of Railroads delegated to deal with the amendments to the Act of 1926, at the time such amendments were considered by the respective committees of the Senate and House of Representatives in S. 3266 and H. R. 7650. Mr. M. W. Clement, the above chairman, proposed among other amendments the following:

> "Provided, that no board created under the provisions of this section shall consider a grievance of any character the cause of which arose more than 2 years prior to the effective date of this Act." (Senate Hrgs. —S. 3266, p. 71; House of Rep. Hrgs. H. 7650, p. 137).

The proposed amendment was not adopted.

Mr. Joseph B. Eastman, testifying before the Senate Committee on Interstate and Foreign Commerce (S. 3266, p. 17, April 10, 1934), said:

> "Because of the lack of adjustment boards in many situations and the tendency of those which do exist to

deadlock, very disturbing conditions have at times been created especially in recent months, in at least four important instances, strike votes have been taken for the purpose of creating an emergency which would justify the President in appointing a fact-finding *board, so that these grievances* and similar controversies might be passed upon by an impartial body."

Similar testimony was presented by Mr. George M. Harrison, on behalf of the standard railway labor unions. See Hearing on H. R. 7650, pp. 80-82.

Conclusion.

The importance of this case transcends that of the rather technical legal issues to be decided. It involves fundamental differences between the carrier and employees as to the procedural processes to be followed in effecting changes in rates of pay, rules, or working conditions of crafts and classes of employees fixed by collective bargaining agreements.

If the carrier prevails in this case, there will be established a principle which will have as serious effect as it will be far reaching in related industries governed by such agreements.

Employees in the transportation industry and related industries are uniformly affected by the decision of the court below. If this decision is to prevail, every collective bargaining agreement in effect between carriers and their employees, covering every class and craft, as filed with the National Mediation Board under Section 5, Third (e) of the Railway Labor Act, as amended, may be changed indiscriminately by the negotiation of individual agreements.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

WILLIAM G. MCRAE,

LEO J. HASSENAUER,

Attorneys for
The Order of Railroad Telegraphers,
Petitioner.

APPENDIX A.

The following is a list of decisions of the United States Railroad Labor Board, created under the Transportation Act of 1920, and the National Railroad Adjustment Board, created by the Railway Labor Act of June 21, 1934, wherein these Boards consistently held that no changes in agreement covering rates of pay, rules or working conditions could be effected without notice to the signatory representatives of the employees.

U. S. Railroad Labor Board.

Decision 3798.

Bro. of Railway & Steamship Clerks v. Northern Pacific Railroad Co.

"OPINION.

"The effect of the rules of an agreement cannot be changed by local understanding, unless concurred in by the parties signatory to such an agreement."

National Railroad Adjustment Board.

Award No. 2205—Third Division.

The Order of Railroad Telegraphers v. The Atchison, Topeka & Santa Fe Ry. Co.

Claims of The Order of Railroad Telegraphers for the difference between what employees received and what they should have received were sustained. The Board in its Opinion said:

"The Carrier attempted to show a variance of the Agreement by a subsequent understanding that the construction contended for by the Carrier should be adopted. The subsequent understanding, however, was with a Local Chairman of the Relay Division who was not a party to the Agreement and who at most

could have bound only his Relay Division. Both of the claimants here involved were of other divisions."

Award No. 732—Third Division.

The Order of Railroad Telegraphers v. Chicago, Rock Island & Pacific Railway Company.

In the course of the Opinion of the Board, it was held:

"The agreement is executed for the Telegraphers by the General Chairman and General Secretary and Treasurer. It is in every respect a collective bargaining agreement. The right to make such agreements is now well established. Recent decisions of the Supreme Court (See *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 58 Sup. Ct. Rep. 571: *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 58 Sup. Ct. Rep. 577; *National Labor Relations Board* v. *Mackay Radio and Tel. Co.*, 58 Sup. Ct. Rep. 904) fully recognize this right.

"The right to bargain collectively carries with it the right of group representation, otherwise the benefits of collective bargaining could never be realized, and to concede to an individual employee covered by a collective bargaining agreement the right to change, modify, waive or invalidate any of the provisions of such an agreement would defeat the very purpose of collective bargaining. Moreover, to recognize any such right in cases like the instant case would give to the employer a power he should not possess if we are to have collective bargaining. (See cases cited above.)

"The Board finds that the existing agreement between the parties cannot be changed or modified or any of its provisions waived except in the manner provided therein or by mutual agreement between the parties who negotiated and executed the same or their duly authorized agents or representatives."

Award No. 765—Third Division.

The Order of Railroad Telegraphers v. Boston & Maine Railroad.

The Opinion of the Board stated in part as follows:

> "It should be unnecessary to add that the action of the former agent in making a special agreement was not binding on either organization, or his successors represented by a collective bargaining agency under an agreement expressly dealing with the manner of establishment of rates."

Award No. 522—Third Division.

The Order of Railroad Telegraphers v. Pere Marquette Ry. Co.

The Board in its Opinion stated:

> "In the claim at issue the facts are evidenced that the agent at Bridgman was working under a collective agreement which had been properly negotiated between and ratified by the Carrier and the organization of which he formed a part. So long as the agent was employed by the Carrier in the capacity of agent at Bridgman he was working under the rules of that agreement and was bound and governed by its specifications and requirements; and any other supplementary agreement or contract made or entered into by him as an individual that would in any manner change or modify, invalidate or set aside, or that was at variance with the rules, conditions, rates of pay or terms of that agreement, was invalid and a violation of the principles of that agreement unless such supplementary agreement had been effected and ratified following conference and negotiation between the parties to the original agreement."

The Carrier members of the Board dissented in separate dissenting opinions. However, it is interesting to note that the Carrier members were in accord with the principle that no issue was taken with the pronouncement in the

award that an individual employee cannot revise a collective agreement.

Award No. 218—Third Division.

The Order of Railroad Telegraphers v. The Chicago, Rock Island & Pacific Railway Co.

The claim of the organization for the difference in commission rates from 10 per cent to 6½ per cent for express shipments, was sustained.

The Board in the course of its Opinion stated:

"The reduction in Hankins' commissions amounted to a reduction in his total compensation paid him for the work which he performed for the Carrier. The very essence of a collective agreement of the sort involved in this case is that reductions in the compensation of individuals shall not be affected by individual bargaining with the particular employe, but shall be effected only through negotiations with his representatives, who are the parties to the agreement. Article 23 simply expresses this principle when it provides that no departure from the rates of pay prescribed in the agreement shall be made without prior notice to the representatives of the employees. It is immaterial that this Article speaks of 'rates of pay' and does not specifically mention commissions. The commissions are a part of the total pay and whether Article 23 were in the agreement or not, the carrier would be obligated to negotiate desired changes in pay with the representatives of the employees, and not with the employees individually. To hold otherwise would be to destroy the whole purpose and very being of the Agreement.

"Since the carrier should therefore have notified the employee's representative of the commission reduction, which it desired in its own interest to effect in conjunction with the Express Company, the carrier violated the Agreement, and must be held responsible for loss suffered by the employee as a result. Had the

representatives of the employee been notified, and had the matter been properly negotiated with them, it may well be that some reductions in the commissions would have been agreed upon. But this was not done, and we cannot speculate on what might have happened. The simple result of the whole transaction was that the railroad saved money in joining with the Express Company in effecting the commission change, and that the work that Hankins performed for the carrier was paid for in a lower total amount. We are not concerned with whether this was a fair result or not, or whether prior to the change Hankins was or was not being overpaid. We are concerned only with the manner in which the change was accomplished. It was accomplished by individual bargaining in violation of the agreement, and that disposes of the case."

Award No. 524—Third Division.

The Order of Railroad Telegraphers v. The Chicago, Rock Island & Pacific Railway Co.

The claim of the Organization that the Agreement was violated and that the employee involved be compensated for the difference in the rate of pay provided in the Agreement and that arbitrarily fixed by the Carrier, was sustained.

The Board in sustaining the claim said in part:

"In connection with the waiving of penalties or making changes in rules contained in schedules and agreements which have been jointly ratified following conference and negotiation between the parties, the Board submits that no such action can be taken except it be through following the same orderly process of conference and negotiation as had preceded the ratification by the parties of the original agreement."

Award No. 528—Third Division.

The Order of Railroad Telegraphers v. Missouri Pacific Lines.

In the Statement of Facts the Board said:

> "On July 1, 1930, the Railway Express Agency, Inc., through its Superintendent, and with the concurrence of the management of the Missouri Pacific Lines, arbitrarily (by bulletin notice to all railroad station agents concerned) reduced the carload commission rate on both territories to 3%, with a maximum of $5.00 per carload express shipment, without notice, conference or agreement with the duly designated representatives of the agents."

The Board sustained the claim of the employees and said:

> "Considering further the responsibility of the Carrier and the joint agencies established, the Board submits that inasmuch as the Carrier required its agents to handle express and permitted them to receive compensation or commissions from the Express Company for such handling, the fact is evidenced that the Carrier recognized the handling of express as a part of the agent's duties, and predicated the amount of compensation or wages to be paid by the Carrier to the agents affected upon an estimate, knowledge or reasonable assumption of the express commissions or compensation which the agents were to receive from the performance of those duties, incident to their railroad work, which were performed for the express agency.
>
> "Insofar as the agreement between the Carrier and General Committee is concerned, the Board submits that the commission rates established prior to the reduction, existed at the time the agreement between the parties was ratified, and had existed for some time previous to the ratification of that agreement, and form a sound basis for the conclusion that the original express commission paid before the reduction was a determining factor or means of arriving at a mutual understanding between the parties to the agreement of the compensation to be paid by the Carrier to the representatives of the joint agencies affected by the reduction in the commission rate.

"In view of these conditions the Board submits that the commissions paid by the Express Agency at the time the agreement between the employes and the Carrier was ratified formed as much a part of the compensation of the employes or agents affected as the figures written into the agreement for the railroad service, and disturbing the basic rate upon which the Agents' compensation from the Carrier was founded and permitting the express commissions to be reduced without conference and agreement, the Carrier violated the principles of the existing agreement between the parties."

APPENDIX B.

Section 153, (i), (p), & (q) of the Railway Labor Act as amended, June 21, 1934:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected

as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

THE ORDER OF RAILROAD TELEGRAPHERS,
Petitioner,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Respondent.

No. 343

BRIEF FOR RESPONDENT

H. S. MARX,
New York City

A. M. HARTUNG,
New York City

ALSTON, FOSTER, SIBLEY & MILLER,
Atlanta, Georgia

BLAIR FOSTER,
Atlanta, Georgia

Attorneys for Respondent.

of Counsel.

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IN THE

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THE ORDER OF RAILROAD TELEGRAPHERS,
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vs.

No. 343

RAILWAY EXPRESS AGENCY, INCORPORATED,
Respondent.

BRIEF FOR RESPONDENT

The petitioning Order of Railroad Telegraphers seeks from this Court a holding which would strike down several employment agreements between respondent and certain railroad agents, who, under these challenged contracts, served respondent as express agents in addition to the services rendered by them to the railroad. Petitioner's attack upon the agreements is grounded upon the Railway Labor Act of 1926, prior to its amendment in 1934. The "main question involved," according to the

certiorari petition[1], turns upon the application of § 6 of that act "to the facts in this case." Petitioner asserts that because the agreements were made without giving to petitioner, as representative of these railroad agents, the thirty days' "written notice provided for in § 6" in an effort to reach an agreement as to time and place for conference"[1] they are, and from their making have been, void. The key words in petitioner's statement of the "main question involved" are those which link § 6 to "the facts in this case." It being essential, therefore, that the facts established in the record, be carefully appraised, and since the "Summary Statement of the Matter Involved" furnished by the petitioner[2] is fragmentary and inadequate, we set forth here, as concisely as may be, what we deem to be necessary to a full understanding of the issues.

STATEMENT OF THE CASE

In 1917 the Southern Express Company, one of the respondent's predecessors in the express business, entered into an agreement concerning rules and rates of pay governing agents of that company, "who are jointly employed as railroad and express agents." (R. 19-22.) Although this document was signed by "D. May" in behalf of the Joint Agents, and the name of the petitioner appeared nowhere in it, respondent views it as one to which The Order of Railroad Telegraphers was signatory as a party thereto.

Respondent, since its entrance into the field of express transportation on March 1, 1929, has contended that

[1]Certiorari petition, page 14.
[2]Certiorari petition, page 7.

this contract was not its obligation, either by adoption or otherwise. Petitioner has insisted that respondent's action in continuing generally to pay to joint-agents the rates of compensation specified in this contract was a recognition of the fact that it was bound to do so. That issue was the backbone of the controversy between the present parties when they were before the National Railroad Adjustment Board at the instance of petitioner, who there, in 1935, sought an award that would establish the Southern Express contract as one which obligated respondent. Petitioner was successful before the Board and in December, 1937, its claim was sustained by the neutral referee in Award No. 548. (R. 7-18.)

In December, 1939, petitioner, as a plaintiff[1], entered the District Court for the Northern District of Georgia for the purpose of enforcing the order of the Adjustment Board. The complaint which it then filed contained a prayer for relief of a general nature, but the allegations in paragraphs 7 and 8 plainly showed that the action was instituted in the district court in order to articulate, to use the expression of the district judge, the monetary claims of twenty-two joint-agents to the general award. The plain purpose of the proceeding was to compel respondent to heed the Board's award through the medium of a district court judgment for a named sum of money to be recovered by petitioner for the benefit of the individuals named in the complaint to the extent of the interest of each. This interest was, as to the several persons listed, stated to be an amount representing the difference between the schedule of commission

[1]Petitioner proceeded under Paragraph p, Section 3 of the Railway Labor Act. (Title 45, Section 153 p, U.S.C.A.).

rates in the 1917 contract and those which the respondent had in fact paid the named individuals. (R. 2-41.)

Respondent interposed defenses, among others, that the quantity and quality of proof before the Board did not authorize a finding that the Southern Express contract was binding upon it; that with respect to Dinkins, joint-agent at Lawtey, Florida, and other joint-agents handling car-lot shipments of "perishables" under refrigeration, such traffic was not within the contemplation of the parties to the 1917 agreement and was not included in its terms; that nothing over and beyond the amounts paid the several agents for whose benefit the suit was proceeding could be recovered since such payments discharged in full respondent's obligations to these agents under special, separate and individual contracts made and carried out with and by each of them; that all joint-agents had been notified, in substantial compliance with Article 14 of the 1917 contract, that compensation thereafter payable on carload shipments would be a fixed sum per car rather than a percentage of the express revenue; and that, in any event, the Georgia statute of limitations barred recovery on all items over six years old.

All issues went against respondent in the district court after a hearing at which was filed a stipulation as to the facts that included a recitation of the circumstances under which each of the separate compensation agreements relied upon by respondent was reached. (R. 68-100.) But the reversing judgment of the Circuit Court of Appeals sustained the validity of the separate contracts with the several agents upon a consideration of the facts in each case and further found and decided that the transactions as to which it was contended Dinkins was underpaid.

because not paid in accordance with the Southern Express contract, were not included within the terms of that contract at all. Moreover, it was held that the notices to all joint-agents, "and the securing the consent to the arrangement of each agent affected, was the substantial equivalent of the notice provided for in Article 14" of the contract. The Court took occasion to add that it was in no doubt that the six-year bar of the statute of limitations had fallen as to all items accrued more than that number of years before the suit was filed.

Nevertheless, there was an affirmance of the district court's decision that the National Railroad Adjustment Board was justified in finding, on the record before it, that respondent assumed, and, therefore, was bound by, the old Southern Express Company contract of 1917. In consequence the case stands here, as it did below, as one in which respondent, having an agreement with petitioner, namely the union representing the joint-agents, regarding the rates which would generally govern compensation payments to such agents, made separate and special agreements with some of those agents varying the named rates of pay. The judgment now under review upheld these special agreements as being within the power of the parties to make them, and as not prohibited by the Railway Labor Act. Some of them were additionally validated because the subject matter of the special contract was found not to be embraced within the coverage of the collective agreement[1].

[1] This was true as to Dinkins' total claim and judgment and generally true in all other instances where the claims and judgments were reckoned upon commissions earned in the handling of car lot movements of "perishables" under refrigeration. The judgment awarded Dinkins $40,100.87 out of a total of $49,073.96 awarded to all joint-agents, including Dinkins. (R. 358.)

Along with "the facts in the case" to which the law, including § 6 of the Railway Labor Act is to be applied, the following should be marked for special emphasis:

> At the time when the several separate individual agreements now considered were made, respondent had approximately 350 joint-agents, acting at as many stations, on the Seaboard Air Line Railway, who were affected by the collective agreement of 1917. (R. 319.)
>
> From 1929, when respondent began express operations on the line of railroad, to the bringing of this suit in 1939, the number of instances in which the compensation rates fixed in the Southern Express Company contract were departed from by individual agreement were few. The record shows only twenty such agreements effective at but sixteen agencies.[1] The points were scattered from Virginia, through North and South Carolina, Georgia, Alabama, and Florida.
>
> Each of the individual contracts (R. 68-100) entered into between respondent and the railroad agent had the support of cogent business reasons for the change. We do not here go into the facts pertaining to each case. They may be found in the Record beginning at page 68. Those relating to the situation involving Dinkins at Lawtey, Florida, are peculiarly noteworthy. (R. 84.)
>
> The Southern Express Company contract of 1917 by its terms made the rates of pay therein set out applicable generally to joint-agents on the Seaboard Air Line. It did not commit the carrier to employ, or contract with the railroad agent, solely on the basis of the named rates.

[1] Successor agents at some points carried on thereat the special contract of their predecessors.

THE ISSUES

Perhaps the best approach to an accurate statement of the precise point or points with which we will finally be concerned in this case is to state at the outset what is not involved. Let us make it plain, therefore, at once, that we are not here dealing with a case in which a carrier, by a *notice*, falling short of that required by the Railway Labor Act, which notice has been given to a class or group of its employees, has undertaken through that medium to change existing rates of pay of the class or group, as established in a collective agreement with the representative of the class. Nor is the case one, on its facts, in which a carrier, by *notice* to an individual employee, has thereby undertaken to change his existing rate of pay as established in a collective agreement under which theretofore he had been working. In respect of every one of the twenty joint-agents for whom judgment was recovered in the district court (R. 357) respondent had the consent of that joint-agent to make effective, as to him, a rate differing from that in the Southern Express contract. Thus from this consent there resulted a separate and special agreement between that joint-agent and respondent. The petition assumes, and from the facts of the case it could not do otherwise, that respondent in making changes in an individual agent's compensation relied on the consent of the agent to that change, hence upon an agreement, and not upon the force of notice alone. See Specification of Errors Nos. 2, 3 and 4. The petitioner, however, does attack the individual, special agreements between respondent and the agents, not because reality of consent is lacking, but upon the ground

that they have no force or vitality since the notice provided for in § 6 of the Railway Labor Act of 1926 was not given, and no attempt was made, as required by that section, to agree upon a time and place for conference.

The fifth specification of error made in the petition would seem to draw into question, regardless of the want of notices provided for in § 6 of the Railway Labor Act, the validity of an individual agreement between respondent and a joint railroad-express agent, when such agreement was made directly with the individual agent changing the rate of pay stated in the existing contract between respondent and petitioner, as representative of the joint-agents. This, so it seems to us, is the basic question inasmuch as a decision voiding these individual agreements would obviate the necessity of deciding whether, at the time they were entered into, or at any time, statutory notice to the union should have been given, and conference undertaken, as a condition precedent to their effectiveness.

Thus, the questions framed by the issues, as respondent sees them, under the facts of this case, are:

(1) Is there any prohibition in the law, including the Railway Labor Act of 1926, against a carrier entering into a special agreement with an individual employee wherein there is established, for that employee only, a rate of pay differing from that fixed in a schedule contained in an existing agreement between the carrier and a union as representative of the class of which the employee is a member?

(2) Assuming that such agreements are not forbidden, does their validity depend, when made subsequent to the initial hiring, upon the carrier having given to the union the notice and attempted the conference required in § 6 of the Railway Labor Act?

(3) Is the statute of limitations of the forum to be applied to demands for specific sums of money which individuals assert in court against a carrier under a general award of the National Railway Adjustment Board?

An Issue Not Before This Court

As its fourth separate defense in the district court respondent pleaded that the special agreement made with Dinkins, at Lawtey, was valid because it did not vary, it could not be construed to change, the terms of the 1917 contract. (R. 48-51.) The money judgment entered for Dinkins was the equivalent of a finding by the district judge against the plea. In its Statement of Points to be Relied Upon On Appeal, respondent contended (R. 361):

> "C. That the individual contract between C. Dinkins and defendant for maximum commissions on shipments of refrigerated carloads of strawberries from Lawtey, Florida, is not contrary to the terms of the agreement of August 1, 1917, nor prohibited by it and that this individual contract is valid."

In support of its position, respondent, as appellant in the Circuit Court of Appeals in its brief there filed, made substantially the following argument, which it now repeats:

The contract made with Dinkins differs in a most important particular from the others dealt with in the Stipulation of Facts. That difference is found in this: In making a special arrangement with Dinkins touching the rate of commissions he was to receive on car-lot movement of strawberries under refrigeration the parties were negotiating about a subject matter not covered by the 1917 agreement. If this then is found to be true, it follows that the collective agreement, being inoperative, was not violated when a separate contract was made which did not conflict with its provisions.

To be more concrete: The collective agreement specified rates of commission that the Southern Express Company would pay on total *express* business received at and forwarded from the station where the joint-agent served. The word "express" does not immediately precede the word "business" in the first line of Article 2 of the Southern's contract but there ought not to be the least hesitancy in saying that the Article should be read as though it were present. But the express revenues, upon which the commissions are to operate are those revenues paid as express charges for the carrying and handling of what the parties then understood as the express business. That does not, of course, mean that because the express company had never carried an elephant as an express shipment to Lawtey, or elsewhere on the Seaboard Air Line, commissions of a joint-agent at Lawtey for handling an elephant in express service would be a case for special contract if the agent was working under the collective agreement. But it does mean that if a distinct class of traffic which *the express company had never held itself*

out to carry, and which, in fact, it was barred from carrying under its agreement with the railroad on whose lines it operated, was by the lifting of this bar, converted into express business, commissions of a joint-agent with respect to this *new business* would be, properly, a case for special contract. We do not spell out the distinction between the two cases as the essential difference seems plain enough. The facts, as agreed to by the parties, places the Dinkins case in the second classification.

As to what these facts are this Court is respectfully referred for a short statement of them to the Appendix of this brief and for a fuller one to pages 84-90 of the Record.

Upon a consideration of this question as thus presented on appeal the court below said:

> "As to the claims in group one (the Dinkins claim), there was no violation of the contract, because, under the undisputed evidence, carload express shipments of 'perishables' were not within the contemplation of the contracting parties and were not included within its terms. Indeed they were not instituted until 1929."

The certiorari petition does not challenge this finding. It does not raise the question that the Circuit Court of Appeals erred in upholding, under the facts, respondent's contention that the 1917 contract, because it never touched it, was not changed or modified by Dinkins' special contract. In the light of this the question is not open for decision here, not having been brought forward by the petition for the writ. *Washington Coach Co. vs. La-*

bor Board, 301 U. S. 142, 146; *General Picture Co. vs. Western Electric Co.*, 304 U. S. 175, 177.

THE ARGUMENT

Special Individual Agreement Between Respondent and a Joint-Agent Was Permissible

We are mindful that liberty of contract is not guaranteed as an absolute right either by the due process clause or any other provision of the Constitution[1]. But freedom of contract is the rule, and restraint is the exception. As was said in *Fleming vs. Belo*, 121 F. (2) 207 (at 214):

> "Freedom of contract, within constitutionally valid limitations, is, in the United States of America, one of the fundamental freedoms and this is particularly so in regard to labor relations. When, then, it is contended as here, that a statute has cut off or limited this freedom, a litigant must point to something more than his opinion that it ought to be cut off or limited, must point to language clearly and validly so providing. There is no more authoritative principle in the field of labor law than that, subject of course to valid statutes designed to prohibit substandard conditions and unfair labor practices, wages, hours and work conditions are the proper subject of contract between employer and employee and their agreements must be, and are, given full effect in the courts."

So it is that if a carrier is not prohibited by some statute from reaching an agreement respecting wages with one of its individual employees, or has not therein by

[1] *West Coast Hotel Co. vs. Parrish*, 300 U. S. 379.

contract with others bargained away this right, it is free to enter into what agreements it pleases, and can make with those who would work for it. Specifically, the respondent had the right unless restricted by the Railway Labor Act of 1926[1], or by the terms of the 1917 contract, to make the agreements which it did with Dinkins, at Lawtey[2] (R. 84), Holmes, at Councils, North Carolina (R. 76), and Womble, at Apex, North Carolina (R. 74). Admittedly, in singling out for special mention here these three instances[3] among the twenty involved in this suit, respondent has selected those in which the separate contract with the agent has in it no admixture of notice at all, but rests upon a definitely expressed assent of the agent to the different and lowered compensation rate. Yet, as a test of its position and the principles which it invokes, petitioner cannot complain of this selection since on this point its case here is no stronger than any example respondent might choose from among those who were the beneficiaries of judgment in the district court.

First, then, did the 1917 contract by its terms make the compensation rates therein provided the sole and only ones which the carrier could pay to those employed by it

[1] The statute involved is the Railway Labor Act as it stood in 1926 (44 Stat. 577) since every act with which we are here concerned occurred before the 1934 amendment.

[2] While it is true that the lower court found that the subject matter of the special agreement with Dinkins was not covered by the Southern Express contract with petitioner, it also ruled, in principle, that had the 1917 contract covered car lot movements of "perishables" respondent was free to make special arrangements direct with Dinkins respecting the pay he would receive for handling them, and this it might do although the pay rate of the 1917 contract was lowered by the separate agreement.

[3] For the ready reference of this Court there is set forth in an appendix to this brief the facts surrounding the making of the Dinkins, Holmes, and Womble contracts.

as joint-agents? Petitioner has never contended that it did so operate and indeed it could hardly do so in view of the language which the contract employs. In the negative sense no words are used which forbid employment of railroad agents by the express company upon a pay basis other than that stated. The contract between the union and the carrier establishes a rate generally applicable in the employment of joint-agents, but plainly does not bind the company not to engage the services of railroad agents upon any other basis. The scheduled commissions are not, by the contract, made exclusively those which must be paid.

So, if the contract of 1917 did not operate to bar the arrangements which respondent made with Dinkins, Holmes, and the others, is there anything in the law which would condemn them? The answer is that the agreements must stand as the parties thereto made them unless prohibited by some provision of, or policy inherent in, the Railway Labor Act as it read before the 1934 changes.

There are no words in the Act which amount to a direct restraint against the carrier entering into individual agreements with its employees, whatever may be the status of its relationship with the organization representing them. There is, of course, the sixth section which requires notice and conference arrangement before intended changes in rates of pay can be made. Of that section and its applicability to the facts in this case we will treat later[1]. Here it is sufficient to repeat that, except

[1] Post pages 29 et seq.

as the right to change existing pay schedules may be affected by this section, no specific words can be found that act as a deterrent against the making of individual agreements between carrier and employee, regardless of whether a collective agreement has been or may thereafter be negotiated. But, with full realization of this, petitioner points to the policy of the Act and the general duty imposed therein, both upon carrier and employee, of making and maintaining agreements concerning rates of pay through the exertion of every reasonable effort, and says that individual wage agreements at variance with a collectively bargained one, being violative of this policy and that duty, are in consequence void. This Court in *Virginian Railway Co. vs. System Federation No. 50*, 300 U. S. 515, has, we think, ruled otherwise.

Before applying the principles which that case established, we may well consider the threefold aspect in which can be viewed an agreement between the carrier and an individual employee as related to a collective contract with the representative of the class to which the employee belongs. First, the individual agreement may have been made prior to the making of the collective one. In the second place, it may have been reached, after the collective bargain had been negotiated, by a person newly presenting himself for employment. Or, lastly, the individual agreement may take place after the collectively bargained one has gone into effect, by one who had originally contracted to work under its terms. It is respondent's position that common principles govern all three cases alike and that in each of them the individual agreement is good. This, of course, presumes that the

carrier or employer in the two last mentioned instances had not voluntarily assumed an obligation in the collective contract not to hire upon terms other than those stated in it, and that in all three circumstances there was no unfair labor practice involved. And, let us add, the fact of making the special agreement is not, in and of itself, such a practice[1].

The principle that agreements with individual employees might live side by side with a collectively bargained contract covering, generally, employees of the same class or craft, is ruled in the *Virginian Railway Company* case, supra, and reaffirmed in *Labor Board vs. Jones & Laughlin*, 301 U. S. 1. In the former it was decided that there was nothing in the Railway Labor Act which would outlaw a special wage agreement with a single employee even though a collective understanding on the same subject and upon different terms might thereafter be, or might theretofore have been, negotiated with a representative of a majority of the employees comprising the class of which the individual was a member. That the decision has this force is clear upon analysis of the opinion. The decree there upheld was construed to mean that the railroad company, while under no compulsion to make any agreement at all, could negotiate respecting rates of pay with no one but the plaintiff Federation, which represented a majority of the employees. The sustained decree required that in matters affecting wages and working conditions of employees, *generally*, the car-

[1]Each agreement is to be measured in this respect by its own facts and we reinvite the Court to read especially those relating to the agreements reached with Dinkins (R. 84), Holmes (R. 76), and Womble (R. 74), as set forth in the appendix.

rier *had to treat with the plaintiff*, and with it alone. Nevertheless, said the court, the carrier might make contracts upon this same subject with individual employees. Certainly the court did not anticipate that the negotiations with the Federation, upon which the railroad company had been ordered to enter, were foredoomed to failure. So to have prejudged the result of the meeting of the representatives of the parties, which the court had commanded, would have evinced a total lack of confidence in the principles which gave birth to the Act, and would have made of the court's decree an empty form. And so if it was thought by the court that these negotiations might come to fruition, it must have conceived also that out of them might come a collectively bargained wage agreement differing in its terms from the contracts which, under the freedom allowed it by the court, the railroad company had negotiated with individual employees. The holding in the *Virginian Railway* case is that there is nothing in the law that would strike down the wage contract with the individual merely because there might later come into being or because there already exists a collectively bargained understanding affecting, *generally*, the wages of the class to which such individual belongs. This is made abundantly clear by the following language taken from the opinion (p. 548):

> "We think, as the Government concedes in its brief, that the injunction against petitioner's entering into any contract concerning rules, rates of pay and working conditions, except with respondent, is designed only to prevent collective bargaining with anyone purporting to represent employees, other than respondent, who has been ascertained to be their true representative. When read in its context

it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent, but not as precluding such individual contracts as petitioner may elect to make directly with individual employees."

The present Chief Justice, in the passage just quoted, referred by footnote to an excerpt taken from the brief of the Government and with which the Court said it was in accord. It is illuminating and we quote it:

> "Neither the statute nor the decree prevents the carrier from refusing to make a collective contract and hiring individuals on whatever terms the carrier may by unilateral action determine. In hirings of that sort the individual does not deal in a representative capacity with the carrier and the hiring does not set *general rates of pay*, rules, or working conditions. *Of course, as a matter of voluntary action, not as a result of the statute or the decree, the carrier may contract with the duly designated representative to hire individuals only on the terms of a collective understanding between the carrier and the representative.*" (Italics supplied.)

In such manner we have this Court approving, as a correct embodiment of the law, the statement that where there is no voluntarily assumed obligation by the carrier to employ individuals *only* upon the terms of the collective contract a particular person may lawfully be hired upon such terms as are mutually acceptable to him and the employer.

In the *Jones & Laughlin* case, supra, the doctrine of freedom of individual contract which was allowed in the *Virginian Railway* case under the Railway Labor Act was reaffirmed under the National Labor Relations Act. It was there said (at page 45):

> "We also pointed out that, as conceded by the Government, the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was 'designed only to prevent collective bargaining with anyone purporting to represent employees' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts as the Company might 'elect to make directly with individual employees.' We think this construction also applies to § 9 (a) of the National Labor Relations Act.

In neither of these two cases was the right of individual wage agreement sustained *because there did not exist a collective agreement setting a general wage scale applicable to a class or craft.* Nor do these cases hold that, upon the making of a wage contract with the representative of the majority of the class, all subsisting, but differing, individual wage agreements, ipso facto, fail. On the contrary, this Court establishes the law to be that neither the Railway Labor Act nor the National Labor Relations Act takes away from the carrier or employer the

right to make with individual employees wage agreements that may be at variance with the contract thereafter made with a union as representative of a majority of the employees. A special wage contract, negotiated with a single employee, may get its death warrant from the commitment of the employer, incorporated in the collective undertaking, to hire upon no different terms than those set forth, but it is not condemned by the Railway Labor Act.

Granted, then, that the *Virginian Railway* case rules in favor of the validity of individual contracts made prior to the collective one, how stands the case of a special contract made with a workman who seeks employment after the employer has reached a bargain respecting rates of pay applicable to the workman's craft with a representative of that craft? It is difficult to see why an individual agreement made under the latter circumstances should stand upon any different footing than one made under the conditions first stated. The time at which the special arrangement was made with the employee, whether antedating or postdating the collective contract, cannot be the determining factor. There would be no more reason to outlaw individual agreements of the second class than those of the first. Conceding the right to deal upon an independent basis with the employee in the one instance concedes the right in the other.

The Circuit Court of Appeals for the Ninth Circuit in *General Committee of Adjustment vs. Southern Pacific Co.*, 132 F. (2) 194, which was recently argued here on

certiorari, used some graphic language in applying the ruling in the *Virginian Railway* case to one in which a railroad engineer had undertaken to make a separate individual contract with the carrier, changing the terms, as to him, of an existing agreement between it and the Engineers' Committee. Affirming his right to do so, the Court said:

> "The individual engineer in making his contract has the right also to negotiate for and agree to any terms of employment with the Railway, and is not required by the Act to accept the rates of pay, rules, or working conditions of the Engineers' Schedule. *Virginian Ry. Co. vs. System Federation No. 40*, 300 U. S. 515.
>
> "Usually, when the engineer makes his individual contract, it is with the implied covenant that his rates of pay, working conditions and the rules governing him are those of the Engineers' Schedule. This, however, does not change the individual character of the contract which each engineer has with the Railway. The Craft Schedule is not a contract employing any one. It is a separate agreement—not between the engineer and the Railway, but between the craft as an organization and the Railway. As stated, in nearly all cases certain of its terms, by implied reference, are embodied in the individual engineers' employment contract. Under the decision of *Virginian Railway Co. vs. System Federation*, supra, *the engineer could have made an agreement with the Railway that he was to have the same rates of pay as those of the schedule of a British railway.*" (Italics supplied.)

Petitioner Specifically in Its Brief Concedes the Right of Individual Contract at the Original Hiring

Actually, the petitioner in the present case, and for the first time in the litigation, admits that at the time of the original hiring the carrier and employee are privileged to make such wage contract as they may consider more nearly fits the employee's special case. The acknowledgment appears in the brief incorporated with the certiorari petition[1] at page 26, and is expressed in these words:

> "The right of the carrier and employee to enter into such contract as they please at the time of the original hiring is not impaired by the statute. But such right is exhausted when the hiring takes place without a specific agreement that the terms of the employment are made upon some basis different from the basis provided in the collective agreement. In the absence of such specific agreement, the hiring is presumed to be upon the terms of the collective agreement, and may not be changed except after notices and conferences between the representatives of the carrier and employees signatory to the collective agreement. The provision of the Act requiring collective agreements not to be altered until after notice and conference between representatives designated and authorized so to confer, is not a restriction of the right of the carrier to make any contract it pleases when hiring new employees."

[1]Due to the short time elapsing between the grant of the writ and the assignment of the case for argument, counsel for petitioner and respondent have agreed to waive the rule in reference to the time of service of briefs. Respondent in the preparation of its brief has not had the benefit of any brief or argument on behalf of petitioner beyond that which accompanied the certiorari petition.

This concession on petitioner's part was, perhaps, wrung from it after further study and consideration of the opinions in the *Virginian Railway* and *Jones & Laughlin* cases. It is noteworthy in this, that it recognizes the validity of the individual employment agreement, as made on the occasion of the initial hiring, regardless of the existence or non-existence of a collective bargain.

Without more ado, then, we pass over ground that has been yielded, marking it, however, to show, at least so far as petitioner is concerned, undisputed possession of two points, namely: (1) individual contracts, differing in their wage schedules from those listed in collective agreements, are not made unlawful by the statute, and may co-exist, side by side, with the latter; (2) the carrier is free to enter into such individual wage contracts as it chooses to make at the time of the original hiring, notwithstanding that it is at that time bound by a collectively bargained contract fixing, generally, rates of pay.

The Nature of the Collective Agreement

But if petitioner has surrendered some of the ground on which it once stood, it does not yield it all. It is still insisting, as shown by the foregoing quotation from its brief, that while the right to engage individual employees upon terms mutually agreeable may be present when the original hiring occurs, it "is exhausted when the hiring takes place without specific agreement that the terms of the employment are made upon some basis different from the basis provided in the collective agreement." The

reason ascribed is that unless the employee, when engaging his services to the employer, differentiates his terms from those of the collective understanding, the hiring is presumed to be upon the basis of the latter. It follows, under these conditions, says the petitioner, that the basis of hiring cannot be changed "except after notice and conferences between the representatives of the carrier and the employees signatory to the collective agreement." In other words, no change can be made except as provided in § 6 of the Railway Labor Act.

There are two distinct ideas contained in the foregoing view. One is of the relationship of the described employee to the carrier, and the other is as to the extent of and limitation upon the rights possessed by each because of that relationship. And of the first, first.

It is apparent from the quoted excerpt taken from its brief that the petitioner here is presenting its case to this Court upon the same conception of the employee's relationship to the collectively bargained agreement between employer and representatives of employee that is, and for some time has been, held by the court below. Summarizing the earlier decisions of the Fifth Circuit in *Yazoo vs. Webb*, 64 Fed. (2) 902, *I. C. R. R. Co. vs. Moore*, 112 Fed. (2) 959, and *System Federation vs. L. & A. Ry Co.*, 119 Fed. (2) 509, respecting the state of the law governing controversies arising out of collective contracts, the opinion in the instant case[1] states that these cases held

> "that persons employed under the terms of such a contract have their tenure and rights governed by

[1]Record p. 377.

its terms, and for action taken contrary thereto, to their damage, there is a right of action in them or in the union to redress their grievances. * * * their holding is 'in the absence of any special agreement otherwise, every employment may be presumed to be on the basis of the collective agreement and to adopt its terms, but ordinarily there is nothing to prevent a special agreement if an employee desires it.'"

Neither petitioner nor the Circuit Court of Appeals (nor respondent) sees the collective agreement as the contract of employment. It employs no one. It merely provides a basis satisfactory as between the group and the carrier upon which contracts between individuals and the carrier may be rested. When, without specific agreement otherwise, the terms of employment are made upon a basis differing from that of the collective agreement, the hiring is impliedly upon the basis of the collective agreement and its rates of pay, working conditions and rules will govern.[1] But, as was pointed out in the three cases just cited and in *General Committee vs. Southern Pacific Co.*, supra, that does not change the individual character of the contract which each employee has with the carrier.

The Nature of Each Workman's Contract of Hire and His Rights Under It

Perceiving in this manner that all contracts of hire between employer and employee are essentially individ-

[1]Cf: The opening paragraph of the contract forming the basis of this action (R. 19) reads:

"Rates of Pay and Regulations for Joint Express and Railroad Agents on the Seaboard Air Line Railway: Effective August 1, 1917, the following rules and rates of pay *will govern* the Southern Express Company Agents who are jointly employed as railroad and express agents." (Italics supplied.)

ual in their nature and composition, we may now inquire how employment agreements of the kind we have just been discussing differ, in respect of rights to be exercised under them, from, let us say, those special ones made at the time of original hiring. If it is truly the contract of the individual, and reason and authority permit of no other characterization, then the individual and not the organization has control of it and he is free to end the engagement, or alter it, without being under the necessity of obtaining the permission of the other employees or their representative to do either. We do not suppose that it is doubted that the employee, who at the "original hiring" made an agreement setting up a wage of his own choosing, could at any time thereafter, without notice to or consultation with anyone save the employer, effect with the latter changes in this wage. Given the right to make the individual arrangement in the first place, and that right petitioner has conceded, it follows as of course that the agreement thenceforth is his and his alone, to do with as he pleases. No labor organization, no group of employees, though representing or belonging to the same class or craft, have any interest in such a workman's special contract that would require their recognition by either employer or employee in subsequent dealings between them looking to a change in this particular employee's rate of pay. And this, also, petitioner accepts if we correctly read its brief. But, it adds that this freedom *"is exhausted"* when the hiring takes place upon the terms of the collective agreement whether the reference thereto at time of employment is express or implied. The thought here seems to be that whereas once, at the time of original hiring, the employee was free to choose

whether (1) he would adopt the wage scale written into the collective agreement or (2) set one of his own, his choice of the first so far bound him to the collective agreement, as by becoming a party thereto or a beneficiary thereof, that no change in his rate of pay could thereafter be made without giving notice to and seeking a conference with the employees' representative signatory to the collective agreement. Contrariwise, if petitioner's reasoning holds good, a choice of the second course would have left him and his employer free and untrammeled thereafter to change the chosen pay rate through a mutually satisfactory bargain, without notice to anyone.

There may be found in the position that this argument forces petitioner to occupy, something of the view that the district judge expressed in his opinion. He said (R. 347):

> "No question of individual right of contract in the first instance is here involved. If it were, a different conclusion might well be required. The question involves the validity of individual agreements made, *without retraction of their representative*, by persons subject to the collection agreement." (Italics supplied.)

Opposite those words we set the language of the opinion of the Court whose judgment is under review. It said:

> "They (the three cases previously cited) hold that persons employed under the terms of such a contract (the 1917 contract) have their tenure and rights governed by its terms and that for action taken contrary thereto, to their damage, there is a right of action in them or in the union to redress their grievances.

They do not hold that contracts so made are binding on individual employees *beyond their powers to change the terms by individual contracts with their employer.*" (Italics supplied.)

It seems to us that petitioner's position and the kindred statement of the district judge overlook altogether the nature of the contract that each employee makes at the time of original hiring. *It is at all times and under all circumstances an individual contract and not the less so because the scale of wages selected* coincides with those in a previously negotiated collective agreement. The employee does not hire himself out jointly with others so that he works in a collective sense under a collective bargain. The parties to his employment contract are himself on the one hand and his employer on the other. The terms of that agreement are what he and the employer make them, whether at the time the relationship begins or later by amendment. Even though by adoption the pay provisions of a collective contract become, at first, part of his individual agreement, the same power and right that he has initially to make the choice at all remain with him so that, thereafter, his is the power and his the right to change it. The right to control the contract, as he first made it, whether to live by it or change it, has not been "exhausted" just because once with freedom so to do he selected one rather than the other of two available wage scales.

This same failure properly to appraise the individual character of the contract between workman and management is seen in the previously quoted portion of the district court's opinion. The court fairly intimates that

the employee, "subject to the collective agreement" might, by *retracting his representative*, loose himself from the obligations of the collective contract. There would seem to be no reason at all why retraction of the individual's representative should be a condition precedent to his right to make a special contract fixing the wages he is to receive. The prime consideration underlying the validation of an individual contract, whenever made, is that it is the *individual* act of the employee making it. If it is, then he does not first have to unhand himself from some representative before his act in changing its terms can be recognized and given effect.

Application of § 6 of the Railway Labor Act

So, starting with the premise that this court has given sanction to the making of individual employment contracts between carrier and employee under the Railway Labor Act, despite the presence of a collective agreement setting the pay rate for the class to which the individual belongs, we have undertaken to show that the right and power to change his employment agreement, as did the right and power initially to make it, reside in the individual employee, and are not lost because of the circumstances that in the beginning the employee had adopted as his own the general wage scale of the collective contract.

But even if these conceptions of the rights of employer, employee and union be accepted, there is still unanswered the "main question" posed by the petitioner, which is

whether the carrier and any employee may, by arrangements mutually satisfactory to themselves, alter the employee's pay rate without first giving at least thirty days' notice to the representatives of the employees, of the intended change and arranging within that period for a conference. To a discussion of that question we now come.

It is manifest that in claiming that notice and conference are prerequisite conditions to change in rates of pay, petitioner is invoking the sixth paragraph of the Railway Labor Act of 1926.[1] The precise point for decision is whether notice is required to be given, in compliance with the provisions of the section, in any case in which a change in respect of the wage thenceforth to be paid is being made by unilateral agreement between the carrier and the employee involved.

Respondent's answer to the foregoing question is a flat negative. It denies that under the conditions stated, which are those involved in this action, § 6 of the Act has any application at all. Respondent anchors its petition pos here upon this: The considered section of the Railway Labor Act relates, and was meant to relate, only to intended changes in rates of pay applicable to a whole class or craft of the carrier's employees, and it has no bearing upon, it does not govern, changes in pay which a particular employee and the carrier may elect to make in their individual contract.

That § 6 will admit of no other construction than that given it by respondent seems clear enough upon a read-

[1] Act May 20, 1926, c. 347 § 6, 44 Stat. 582.

ing of the whole section. In the first place we may note that the reference throughout is to the plural, "rates of pay" rather than to the singular "rate of pay" or simply "pay." Also, these words "rates of pay" are grouped wherever they appear in the section with the words "rules and working conditions." The phrase "rates of pay, rules and working conditions" is apt language when related to agreements pertaining to a class or craft of workmen, or to employees as a whole. It is an inappropriate expression when used in connection with an individual employment contract.

But more convincing still is the sentence midway of the section which begins: "Should changes be requested from *more than one class or associated classes at the same time, etc.*" (italics supplied). These words show clearly that Congress in framing the section had in mind requests that would come to the carrier from a class or from associated classes for changes in *rates of pay affecting the class;* or changes in *rules affecting the class;* or changes in *working conditions affecting the class.* Or the request might come from the opposite direction, that is, from the carrier to the representative of the class, respecting intended changes which the carrier would desire to make in class rates of pay, class rules, and class working conditions.

Moreover, the evident intent of the statute is to provide for a lapse of some time between the announced determination, either of the carrier or employees, to change rates of pay, rules and working conditions, and the consummation of the purpose. Conference between

carrier and representatives of the employees are an important part of the scheme to keep down friction and promote amity. But safeguards such as these are useful only where the parties are, or it is foreseen that they may be, *in dispute*. In fact, the section in its latter part, speaks of the "controversy" that it is anticipated will follow the avowed intention of either carrier or employees to alter the bargained agreement between them. On the other hand, the statute is wholly without force or meaning when related to *agreements* that have been arrived at modifying rates of pay, rules or working conditions in individual cases. When this is the situation the change is based upon consent and there is no need of the notice. The conference is meaningless. So, here, in the present case, and in others like it, where the changes result from mutually agreeable arrangements between carrier and employee the purpose of notice and conference disappears.

We should not overlook, in our analysis of this section of the Act, the interpretation which Congress, itself, put upon it in its enactment of the 1934 amendment. Section 2. Fifth of the 1926 Act, provided that "disputes concerning changes in rates of pay, rules or working conditions shall be dealt with as provided in § 6" of the Act. This section became Section 152, Fifth, of Title 45 of the Code. The Congress amended that section by its 1934 enactment so that it now reads:

> "No carrier, its officers, or agents, shall change the rates of pay, rules or working conditions of its employees, *as a class*, as embodied in agreements except in the manner prescribed in such agreements or in Section 156 of this title." (Italics supplied.)

Section 156 of Title 45 is, of course, § 6 of the 1926 Act. This legislative clarification of the earlier law demonstrates the original meaning and intent of Congress that the changes in rates of pay, rules and working conditions, which by § 6 of the 1926 Act were made to wait on notice and conference, were changes "in agreements"* affecting rates of pay, rules and working conditions *of a class*.

Williams v. Terminal Co. 315 U.S. 386

We do find in § 6 that after the specified notice shall have been given, and before any change in rates of pay, rules or working conditions shall be made, conferences shall be agreed upon between "representatives of the parties interested in such intended changes." But the *interest* here spoken of is something more than the mere concern that the union may have lest pay changes agreed upon between carrier and individual employee affect rates of pay scheduled in the collective agreement to which the union is a party. The *interest* which the conference and the notice protect is the stake that the union has in the matter of class rates of pay, class rules, and class working conditions, as established in its contract with the management. It has no interest at all, in the statutory sense, in a change of an individual's rate of pay, consented to by him. Such change leaves wholly untouched and unaffected provisions of the collective bargain naming rates of pay, laying down rules and fixing working conditions.

*These two words were added in 1934 as the nineteenth and twentieth words in Section 156.

Section 6 of the Railway Labor Act Does Not Govern Individual Contracts

We have shown, we believe, that this Court has found nothing in the policy of the Railway Labor Act that would root up the individual contract merely because it grows alongside of the collective one. We have noted that the petitioner concedes that nothing in the statute precludes the right of the carrier and employer to enter into such contract as they please at the time of the original hiring. Let us then consider the case of an employee who, when first presenting himself for employment, agrees with the carrier's representative to work for a wage different from that provided in an existing collective contract covering workmen of his class. Later, we may suppose, the parties to this individual's special contract desire to change its pay base and do reach an accord thereon. Could it be contended, with any hope of bringing conviction, that, before the agreed upon change could go into effect, the machinery of § 6 of the Act would have to be put into operation to the end that notice of the impending change should be received, not by the employee, but by the union? And that it, not he, should be invited to a conference? The considerations that prompted petitioner to acknowledge the validity of this sort of special contract compel a negative answer to this question. The employees' representative has had from the first, even as seen through petitioner's eyes, no concern with this type of special contract, and there is no good reason why any change in it should depend upon notice to and conference with this representative. Yet, were we to apply the statute as petitioner would have

us do, the fulfillment of the agreement would of necessity be postponed until an unconcerned third party, a disinterested union, was formally notified of the arrangement and conferred with concerning it. Yet if respondent is correct in the contention that the original choice of a wage scale by the incoming employee is not the distinction that marks his right to change it, then the case just put is in no way different from one in which the original hiring was on the scale of the collective contract. The notice is as needless, the conference as useless, in the one in the other.

RESPONDENT'S NOTICE TO JOINT-AGENTS ON CAR LOT COMMISSIONS

We have put some emphasis herein upon the statement that the questions for determination must be judged of by "the facts in the case." The certiorari petition and the supporting brief create the impression that respondent justifies changes in commission rates payable to its joint-agents upon the strength of notices given to them as a class, which action failed to meet the test of § 6 of the Railway Labor Act. We have been at some pains to point out earlier that in each of the twenty cases here involved there was a consent by the individual joint-agent to this change, and that respondent relies upon this consent and not upon notice, whether given to the joint-agents as a class or to each singly.[1] Being unwilling, however, to leave a circumstance so vital to a general statement, we devote this section of the brief to its discussion.

[1] (R. 19-22.)

Compensation payable under the 1917 contract to the joint-agents was of three kinds. It might be (a) commissions on total express business received and forwarded (Art. 1); it might cover (b) transfer allowance and pay (Art. 3); or it might represent (c) payments made to make good the guaranteed minimum commissions of $10.00 per month (Art. 1). Judgments rendered for the joint-agents in the district court embraced all three types. Only, however, in case of a change in commission rates ("a" above) was notice of any description given. These cases were seven in number and were:

Paul Smith,
R. H. Turner,
Emory, Georgia,

C. Dinkins,
Lawtey, Florida,

D. Y. Stutz,
Southern Pines, N. C.,

O. H. Smith,
Pembroke, Georgia,

H. A. Borst,
Bass, N. C.,

E. Meares,
McBee, S. C.

In each of the thirteen remaining instances the change in amount of transfer allowance or the lifting of the minimum guarantee followed upon private negotiations between the particular agent and his supervising route

agent or superior. The instances of change were isolated and business conditions, reflected locally, dictated the arrangement, for the details of which we may refer the Court to the stipulation that was filed in the district court (R. 68-100).

But if agreements underlie the changes in respect of transfer pay and minimum commissions of the thirteen joint-agents, agreements no less clear, and consent no less real, support the reduction in car lot commissions paid to the seven joint-agents listed above. Quite briefly we touch upon the facts relating to each of the seven, beginning with those concerning the joint-agent at Lawtey.

Dinkins (R. 84):

> Following a visit from express officials who explained to him the impending change in the nature of express business and the necessity it imposed for changing the type of representation which the company had at Lawtey, Dinkins wrote a letter agreeing that his commissions on car-lot express shipments of berries should not exceed $5.00 per car. The assurance given him that similar arrangements would be made at all other strawberry-shipping points in Florida was kept. For eight years following this letter Dinkins paid himself at the rate that he had in 1929 agreed orally and in writing to accept.

Paul Smith
R. H. Turner } (R. 78):

Smith was agent at Emory, Georgia, in 1930. Turner succeeded him after 1934. Smith got a notice in

April, 1930, that the express company intended to lower the commission rates on car-lot shipments. He wrote in response that he would refuse to comply and stood on the 1917 contract. For approximately a year and a half he paid himself commissions on its basis. In August, 1931, the express company discontinued the joint-agency arrangements at Emory and established its own exclusive office there. Smith wanted to regain the express representation and in October, 1931, made a written agreement that he would thereafter handle the express work on the $5-per-car commission basis. He made his agreement conditional. The Express Company met the condition.

There can be little doubt that Turner, Smith's successor at Emory, went to work in 1934 upon an understanding that his commission on a car-lot shipment by express would not exceed $5.00. He was not a recipient of the 1930 notice. He paid himself on the $5.00 basis with respect to express movements of that kind and in 1935 signed a writing expressing his assent to the $5.00 maximum.

Stutz (R. 90):

Stutz ignored the notice that went out to joint-agents in April, 1930, advising each of them that car-lot commission maximums of $5.00 were desired, and he continued thereafter to pay himself commissions as theretofore on such business. In August, 1931, an agreement was reached with Stutz, evidenced by a writing set forth in the stipulation. Whether an agreement was actually reached with Stutz may be judged of by the following quotation from the stipulation of facts (R. 19): "The Railway Express Agency, as part of the agreement reached with Stutz respecting the rate he was to

have for handling car-load business at Southern Pines, allowed him to retain and keep the commissions which he paid himself at the rate of 9% on car-load business from April, 1930, to August 4, 1931."

O. H. Smith (R. 92):

When Smith became joint-agent at Pembroke, Georgia, in November, 1934, he did so with the distinct understanding that the maximum commissions allowable to him on carload express business were to be $5.00 per car. He signed a statement at that time reading:

> "I understand that the rate of commission allowed at this Agency is 10% on all LCL Express charges, maximum carload $5.00."

Smith paid himself at all times accordingly.

H. A. Borst (R. 95):

Borst received the express company's notice that after April, 1930, it would not be willing to pay more than $5.00 commissions on carload express. He made written acknowledgment of its receipt. Evidence of his consent to the proposal is that for over seven years he paid himself on this basis, deducting each month from remittances made by him to the express company car-load commissions limited by the $5.00 maximum.

E. Meares (R. 98):

Meares not only received the notice but passed it on to the General Chairman of petitioner. In the letter advising that he had done so, Meares expresses his willingness to handle carload express business

on a $5.00-per-car basis. He lived by this agreement, paying himself thereafter at the rate of $5.00 per car for car-load shipments moving out of McBee, by deducting commissions so reckoned from remittances made by him to the express company.

It is submitted that the foregoing summary of the facts unqualifiedly supports respondent in its assertion that in each of the six cases[1] where notice preceded the agreement there was obtained the definite consent of the joint-agent to work on the basis outlined in the notice. In five of them this consent was signified in a writing signed by the agent. In the sixth the actions of the agent through many years manifest his acceptance of and assent to the express company's proposal.

Respondent has no need to contend that mere notice without consent, sent by respondent to all joint-agents, was effective to give force to the purposed change of commission as stated in the notice. In the case now before this Court it is the consent of those affected which followed upon the notice that should void the judgment obtained for them in the district court. The court below held this same thought, and expressed it this way:

> "Further, if it be considered that the contract does not cover such business, the written notice given to each joint-agent, including Meares, local chairman of the division, and by him to the general chairman, *and the securing the consent to the arrangement of each agent affected*, was the substantial equivalent of the notice provided for in Art. 14." (Italics supplied.)

[1]Dinkins' case is to be differently catalogued.

The underscored portion of this quotation brings out the lower court's finding, compelled by the facts, that the consent of Dinkins, Turner, Stutz, Borst, Meares, and the two Smiths, was obtained to the change that was made in their compensation. With this established, their cases stand upon no different footing than do all other individual contracts, and are ruled by the principles which we have been discussing. The assent to the purpose stated in the notice, as to each agent assenting, created with reference to him, but to him only, a separate individual agreement. He was competent to make such a contract, as we have shown, and the same principles that would approve the individual agreements reached with Holmes, Womble, and the others should validate these.

THE STATUTE OF LIMITATIONS

The Circuit Court of Appeals was so appalled by the thought that the machinery of the Railway Labor Act could be used to collect items of any age, as the judgment of the district court obviously permitted, that after deciding the case on its merits for respondent, it went out of its way to say that it was in no doubt that the bar of the statute[1] had fallen as to all amounts sued for that had a greater age than six years. The certiorari petition challenges this ruling.

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[1]There can be no question but what Georgia's statute of limitations, being the law of the forum, governs. *Central Vermont Ry. vs. White*, 238 U. S. 507, 511.

The pertinent provisions of the Georgia law are contained in § 3-705 of the Code of Georgia of 1933, reading:

"All actions upon promissory notes, bills of exchange, or other simple contracts in writing shall be brought within six years after the same shall have become due and payable."

In the brief bound with the petition there is reference to Congressional debate, and petitioner's argument, based on this, and on excerpts taken from evidence received by Congressional committees; seems to be that the carrier's failure to have written into the law a provision restricting the board to a consideration of grievances of not more than a certain age, has opened the way to money judgments against the carrier no matter how ancient the occurrences upon which they rest. The lower court hearing this cause could not believe the Act meant to do so gross an injustice to the carrier, and we share that view.

It must be admitted that there is no limitation set within the Act itself that outlaws, on account of age, grievances which the board may hear, and having heard, make an award thereon. But orders of the board, based on its awards, are not self executing. To enforce them against the carrier, judgment of a federal district court must be obtained.[1] The petitioner before the board, or the person for whose benefit the order has been made, enters the district court with presumptions favoring the correctness of such facts as the board may have found, but the suit that is brought "proceeds in all respects as other civil suits."[2] In this action all manner of defenses are open to the carrier, which include, but are not necessarily limited to, those interposed before the board. If the award rendered was a general one, establishing a relationship between the carrier and its employees from which monetary rights of individual employees spring, such employee, or an organization for him, may come as a

[1] Title 45, § 153 (p), U.S.C.A.
[2] Ibid.

plaintiff into court and, reciting the award, plead his own rights under it. Such a plaintiff must make out his case and in only a part of it, perhaps, may he be aided by the board's award.

In opposing such a plaintiff's suit in the district court, no reason appears why the carrier may not defend upon the ground that items sought to be incorporated in the money judgment are too old and are barred by the local statute of limitations. By disallowing such items the court has not disturbed the award in the least. It has merely denied to plaintiff the right to establish a stale claim, and has accorded him precisely the same treatment given every other plaintiff in that court.

Yet, again, suppose that one of the present joint-agents, for whom judgment was obtained in the present case, had, independently of petitioner's proceedings before the Adjustment Board, brought suit against respondent in the United States District Court for the Northern District of Georgia to recover the difference between commissions actually paid him and those that he contended were due him under the Southern Express contract of 1917.[1] And let us further suppose that in support of his action he brought forward the same sort of evidence that petitioner adduced to win the board's award that the 1917 contract was binding on respondent, and for himself won a similar ruling from the district judge. Can any one doubt that such a plaintiff's money judgment following thereupon would be affected by the pleaded statute of limitations should there be items in his demand

[1]He had the privilege of so proceeding. *Moore vs. Illinois Central Ry. Co.*, 312 U. S. 630.

older than those that the statute would admit? What differentiates this case from one in which the plaintiff, while relying on the board's award to supply some part of his proof, the binding effect of the 1917 contract for instance, must still establish his right to recover? Certainly, so it seems to us, he like his brother plaintiff must overcome all defenses, including those grounded upon the statutory bar of lapse of time, and his suit, like his brother's, must "proceed in all respects as other civil suits."

CONCLUSION

Respondent respectfully submits that the judgment below was correct in upholding the individual employee's right to contract on his own account with the carrier respecting the wages he will get; it was right, also, in holding that even though adopting the terms of the collective agreement the employee did not thereby so far bind himself as to put it beyond his power to enter into an individual contract with his employer. The Court below was equally right in recognizing the bar of the forum's statute of limitations. Its judgment should be affirmed.

Respectfully submitted,

A. M. HARTUNG,
230 Park Avenue, New York City

BLAIR FOSTER,
1220 Citizens & Southern National Bank Building, Atlanta, Georgia

Of Counsel:

H. S. MARX,
230 Park Avenue, New York City.

ALSTON, FOSTER, SIBLEY & MILLER,
1220 Citizens & Southern National Bank Building, Atlanta, Georgia.

APPENDIX

The following are the circumstances, drawn from the record in this case, under which special agreements respecting rates of compensation were made between respondent and Dinkins, at Lawtey, Florida; Holmes, at Councils, North Carolina; and Womble, at Apex, in that same state. In the case of Dinkins the recitation of the facts is an abbreviation of the story set out in full, beginning at page 84 of the Record. In the cases of Holmes and Womble the stipulated facts appearing at pages 76 (Holmes) and 74 (Womble) are already succinct enough and are repeated here without change.

These three cases are selected because each is a representative of one of the three types or kinds of commissions scheduled in the 1917 contract with the Southern Express Company. Thus with Dinkins the agreement related to reduction of commissions on car lot business; with Holmes the $10.00 per month guarantee was involved; while Womble dealt with the respondent about the $10.00 per month minimum transfer allowance.

The Special Agreement of Dinkins

Prior to 1929 strawberries in carload lots under refrigeration did not move over the Seaboard Air Line Railway as express shipments. This was not express business because the railroad by contract had reserved the business for itself. That situation had existed for many years and was true in 1917. There was much complaint about the railroad's service and as a result the Interstate Com-

merce Commission conducted hearings which culminated in 1929 in an order to the Seaboard and other railroads hauling car lot shipments of strawberries out of Florida to step-up the transportation time of the berry trains to the equivalent of passenger trains or otherwise provide passenger train schedule for this type of traffic. The railroads, including the Seaboard, solved the problem by removing the restriction in its contract with respondent covering the carriage of these cars and agreeing upon the terms on which respondent would move them to market in express service. Thus that which had formerly been railroad traffic, exclusively, became *express business* (R. 84, 85).

The two principal strawberry shipping points in northern Florida in 1929 were Starke and Lawtey. At the former place respondent had its own salaried employee, and, therefore, the creation of this new business made small difference. But at Lawtey the Agency's representation was joint with the Seaboard Air Line, and it was paying this joint-agent (Dinkins) commissions on forwarded and received express matter. With the knowledge that it could not afford to pay to Dinkins, on this new express business, the rate of commissions customarily paid him theretofore, express officials visited Lawtey and called on Dinkins, and explained the situation to him. He was told that the express company, unless a satisfactory arrangement could be made with him, would establish at Lawtey the same sort of an office that it maintained at Starke and would appoint a representative and place him upon a salary basis.[1] This did not suit Dinkins and he wrote a

[1]The right of the respondent to have made this change cannot be questioned.

letter, dated November 29, 1929, in which he agreed to accept commissions of five ($5) dollars per car lot on shipments of strawberries leaving Lawtey. The letter reads:

"Lawtey, Florida, November 29, 1929.

"Commission on Car-Lot Movement by Express.

"Mr. A. B. Scruggs, Supt.,

"Jacksonville, Fla.

"Dear Sir:

"The position of the Express Company on the matter of commissions on car-lot shipments was outlined to me today and I am agreeable to accepting $5.00 per car on such shipments.

"It is my understanding that the practice will be general on the Seaboard Air Line.

"Yours truly,

"C. DINKINS,

"Agent."

For the 1929-1930 season, and yearly thereafter for something like eight years, Dinkins has paid himself without protest commissions at the rate of five ($5) dollars per car. The judgment which he holds is for the difference between the total so calculated and what he would have received had the commission rate of the Southern Express Company agreement been applied. All of this is set forth minutely at page 84 et seq. of the record and as part of the facts that were stipulated.

On account of the small amount of business handled at this point, the express office thereat was closed on July 1, 1931. On March 20, 1933, C. B. Holmes, being then the agent of the Seaboard Air Line Railway at this point, wrote to C. H. Sauls, Superintendent of the Seaboard Air Line Railway at Hamlet, North Carolina, as follows:

"Councils, N. C., March 20, 1933.

"Mr. C. H. Sauls, Supt.,

"Hamlet, N. C.

"Dear Sir:

"Our railroad patrons here are very anxious to get the Express office restored here, and have asked me to agree to handle the business for a straight ten per cent without establishing the ten-dollar minimum. This I have agreed to do, and I understand they have a petition to you to that effect.

"The office was discontinued here because some of the months the business would not amount to $100.00 and would run around sixty or seventy dollars, and they claimed that the ten-dollar minimum was too much outlay to justify keeping it open. However, the last month the Express office here was open when Mr. Warren closed the account for the last month he paid me a commission of a little over $15.00, which shows that we did over $150.00 that month. If the Express people wish to open the office I will handle it for ten per cent and cut the $10.00

out just to be of service to our railroad patrons, whom I consider to be very loyal at this point.

"Yours truly,

"C. B. HOLMES,

"Agent."

Acting upon this letter, which was transmitted to it by the said Sauls, the Railway Express Agency did on April 8, 1933, reopen the Express office at this point. It installed C. B. Holmes as the joint railroad-express agent thereat and registered the office as one at which it would pay incumbent for his service for acting as agent of the Railway Express Agency ten per cent commissions on express business handled but without any minimum guarantee. Thereafter, each month the said Holmes has been paid on that basis.

THE SPECIAL AGREEMENT OF WOMBLE

Prior to September, 1932, this point was registered by the Agency as one which any incumbent agent would receive an allowance of $10.00 per month covering his services in making transfer of express matter between trains.

On August 29, 1932, T. F. Womble wrote to W. A. Stephenson, a route agent of the Agency and the person then having supervision of the express office at Apex, North Carolina, said letter being as follows:

"Apex, N. C., 8-29-32.

Mr. W. A. Stephenson R/A,

Raleigh, N. C.

Dear Sir:

Our conversation with reference in express business. I am willing to help all I can and while the transfer from the D & S is very heavy at times and no direct connections made here, I having to handle all the valuables and care for all the freight, I feel that I more than earn the $10.00 allowed for transfer but if the others on this line that get $10.00 for transfer will handle for $5.00 until express business picks up, I will be glad to do the same.

Yours truly,

T. F. WOMBLE,

Agent."

The said Stephenson, upon receipt of this letter, caused Apex, North Carolina, to be registered as an office at which an incumbent agent would receive as transfer allowance the sum of $5.00 per month. This point has remained so registered since that time and only $5.00 per month for this service was paid to the agent until March, 1935. It is agreed that other joint agents on the "line" who were getting "$10.00 for transfer" have, through the medium of contracts individually negotiated with them, agreed to handle the transfer for $5.00.

In January, 1934, T. F. Womble wrote his route agent, then J. T. White, at Norlina, North Carolina, as follows:

"What do you think of restoring the transfer rate here to $10.00? We are handling a lot of shipments and it is costing me practically the entire $5.00 now allowed, to employ extra help to assist in making the transfer."

Acting upon this, the Railway Express Agency, effective March 1, 1935, restored the $10.00 allowance for transfer at Apex and that station was registered on March 1, 1935, as being one whereat the allowance for this transfer work would be $10.00.

p. 5,

SUPREME COURT OF THE UNITED STATES.

No. 343.—October Term, 1943.

The Order of Railroad Telegraphers, Petitioner, *vs.* Railway Express Agency, Incorporated.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 28, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

This hoary litigation presents the question whether a carrier by contracts with individual employees made in 1930 could supersede or expand terms of an agreement collectively bargained between the employer and the union in 1917, in view of the provisions of the Railway Labor Act of 1926, which was applicable when the controversy arose.

Petitioner was a union designated to represent certain crafts and classes of employees of carriers by railroad. Employees here involved are agents at stations on the Seaboard Airline Railroad, who primarily are employees of the railway and secondarily of the railway express agency; they receive compensation from each employer. For some years they were represented by the union in bargaining collective agreements with predecessor express companies. The last was executed in 1917 and was assumed by this respondent March 1, 1929.

In 1930, the Express Company began to handle new business consisting mainly of carload shipments of perishables which formerly had been handled by the railroad company as freight. The Express Company thought the change in volume and character of its shipments warranted an adjustment of rates of pay applicable to certain of the agencies where the shipments originated. The Railway Labor Act of 1926, then in effect, provided that carriers and representatives of employees should give at least thirty days written notice of an intended change affecting rates of pay, rules, or working conditions, and should agree upon time and place of conference.[1] The collective agreement also provided

that no change should be made in its terms "until after 30 days notice in writing has been given." The Express Company gave no such notice to the union signatory to the 1917 collective agreement. Instead, it gave individual notices to the agents that their compensation for such shipments would be $5.00 per car, the notices on one division going out on March 25, and those on another, April 8, and all becoming effective April 10, 1930. The agents involved, after various objections and negotiations, individually accepted the rate, although there is controversy as to whether their acceptance was wholly voluntary. For purposes of decision, however, we assume voluntary assent and that but for provisions of the Railway Labor Act valid individual contracts resulted.

The local chairman of the union protested and insisted that collective bargaining must control the compensation of the agents. The Express Company declined to accede to the claims, and the union's claim that the agents must be compensated under the collective agreement remained unadjusted. Attempts to adjust were renewed by the general chairman, but no voluntary Board of Adjustment was agreed upon as provided under § 3 of the 1926 Act.[2] The statutory Board was created in 1934,[3] the Company refused to join the union in a petition, and the union on October 8, 1935, gave notice of its intention to refer the dispute to the Board. The Company challenged the Board's jurisdiction, a hearing was had, the bi-partisan board deadlocked, a referee was named, and in 1936 objections to jurisdiction were overruled and

[1] § 6, 44 Stat. 582. This provided: "Carriers and the representatives of the employees shall give at least thirty days' written notice of an intended change affecting rates of pay, rules, or working conditions, and the time and place for conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. . . ." The 1934 Act contains a similar provision. § 6, 48 Stat. 1197, 45 U. S. C. § 156.

[2] 44 Stat. 578.

[3] Act of 1934, § 3, 48 Stat. 1189. § 3, First (i) provides: "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

a hearing on the merits was directed. After the hearing the Board again deadlocked, again a referee was chosen, and on December 15, 1937, an award sustaining the claims that the agents were entitled to the compensation provided by the collectively bargained agreement was made, accompanied by a holding that the individual contracts were ineffective. The Company failed to comply with the award and in December 1939, after almost two years, the present action was commenced in the United States District Court. The district courts are given jurisdiction to enforce awards of the Board, its orders and findings being declared to be "prima facie evidence of the facts therein stated." Laws 1934, c. 691, § 3, First (p), 48 Stat. 1192. In June 1942 decision was rendered by which the district court enforced the Adjustment Board's award, The Circuit Court of Appeals reversed upon the ground that the collective agreement had been superseded validly by the individual contracts and upon the further ground that the claims under collective agreements were barred by the statute of limitations.[4] These questions are unsettled ones important to the administration of the current Railway Labor Act, and we granted certiorari.[5]

1. The Company contends that special voluntary individual contracts as to rates of pay, rules, and conditions of employment may validly be made, notwithstanding the existence of a collective agreement, and that the terms of the individual agreements supersede those of the collectively bargained one. If this were true, statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually. It is said, however, that in this case the agreements affect relatively few agents and that those are specially and uniquely situated. This apparently is true, for the application of the collective agreement results in an award of some $40,000 to one agent over the period and less than $2,000 to all of the others, and most of the awards are for a few hundred dollars.

Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.[6] From the first

[4] 137 F. 2d 46.

[5] — U. S. —.

[6] Cf. H. J. Heinz Co. v. National Labor Relations Board, 311 U. S. 514, 523-26.

the position of labor with reference to the wage structure of an industry has been much like that of the carriers about rate structures.[7] It is insisted that exceptional situations often have an importance to the whole because they introduce competitions and discriminations that are upsetting to the entire structure. Hence effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions. Collective bargains need not and do not always settle or embrace every exception. It may be agreed that particular situations are reserved for individual contracting, either completely or within prescribed limits. Had this proposed rate of pay been submitted to the collective bargaining process it might have been settled thereby or might have resulted in an agreement that the company should be free to negotiate with the agents severally. But the Company did not observe the right of the representatives of the whole unit to be notified and dealt with concerning a matter which from an employee's point of view may not be exceptional or which may provide a leverage for taking away other advantages of the collective contract.

The decision in *J. I. Case Co.* v. *National Labor Relations Board*, decided today, considers more generally the relation of individual contracts to collective bargaining, and much that is said in that opinion is applicable here.

We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective agreement in force throughout the period and that the carrier's efforts to modify its terms through individual agreements are not effective. The award, therefore, was in accordance with the law.

2. The Circuit Court of Appeals held the claims barred by the state six-year statute of limitations applicable in the forum. It is true that the enforcement of the award results in entering judgment in 1942 on claims that began to accrue in 1930 and some of which ceased to accrue over six years before the suit in the District

[7] See Lenhoff, "The Present Status of Collective Contracts in the American Legal System," 39 Mich L. Rev. 1109; Daugherty, Labor Problems in American Industry (1933) p. 415; Taylor, Labor Problems and Labor Law (1938) p. 85 *et seq.*; Golden and Ruttenberg, The Dynamics of Industrial Democracy (1942) p. 23-26, 82 *et seq.*

Court was commenced. It also is true that some of these have accrued in large amounts.

If the action brought in 1942 had been a common-law action to recover wages, like that in *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630, a quite different question of limitations would be presented. The action as brought, however, was not a common-law action but one of statutory origin to enforce the award of an administrative tribunal. A special two-year limitation from the time of award was prescribed by the federal statute,[8] and this action was brought within that period. It is clear that as an action to enforce the award the suit was not barred, and it must therefore have been the opinion of the Circuit Court of Appeals that the statute barred the administrative tribunal from making an award on claims so old. There is no federal statute of limitations applicable to unadjusted claims which the Adjustment Board may consider. It is difficult to see how state statutes of limitations can restrict the power of the federal administrative tribunal to consider and adjust claims. Moreover, even if the six-year statute did apply to the claims under the collective contract, as we think it did not, proceedings on these claims were initiated before the Board well within that time.

If, therefore, these claims are barred, it must be because the time occupied in their litigation before the Adjustment Board operates to defeat them. A state statute of limitations can hardly destroy a claim because the period of actual contest over it in a federal tribunal extends beyond the limitation period.

Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Here, while the litigation shows no evidence of reckless haste

[8] Act of 1934, § 3, First (q), 48 Stat. 1192, 45 U. S. C. § 153, First (q): "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

on the part of either party, it cannot be said that the claims were not timely pursued.

Regrettable as the long delay has been it has been caused by the exigencies of the contest, not by the neglect to proceed. We find no basis for applying a state statute of limitations to cut off the right of the Adjustment Board to consider the claims or to absolve the courts from the duty to enforce an award.

The judgment of the Circuit Court of Appeals is

Reversed.

Mr. Justice ROBERTS is of opinion that the judgment should be affirmed for the reasons given in the opinion of the Circuit Court of Appeals, 137 F. 2d 36.

A true copy.

Test:

Clerk, Supreme Court, U. S.